MAUREEN MOXON,

Petitioner,

v.

WEST CANAAN UNIFIED SCHOOL DISTRICT,

Respondent.

RECORD ON APPEAL

August 31, 2022

The people and events described in this record are fictional.
Any resemblance to actual persons or events is purely coincidental.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXASOTA

MAUREEN MOXON, as next friend to K.M., a minor child, Plaintiff, v. WEST CANAAN UNIFIED SCHOOL DISTRICT, Defendant.	No. 22-1999 VSY-BLS

COMPLAINT

GENERAL ALLEGATIONS

1. Plaintiff Maureen Moxon is the mother of K.M., a 15-year-old student at West Canaan High School in West Canaan, Texasota, situated within the Eastern District of Texasota.

2. Defendant West Canaan Unified School District (the "District") is a publicly funded school district within the state of Texasota that has authority over each of the public schools within its jurisdiction, including West Canaan High School.

3. Since at least 1992, Bud Kilmer has been an employee of the District and has served as the coach of the West Canaan High School football team. During that time, he has led the team to two state titles and 23 district championships.

4. Since at least 2001, Coach Kilmer has made it a practice in his locker room, prior to the start of each football game, to lead his players in the recitation of the Lord's Prayer, also known as the "Our Father," a traditional Christian prayer derived from two passages from the Book of Matthew and the Book of Luke in the New Testament of the Bible.

5. The prayer recited by Coach Kilmer and his players is as follows: "Our Father, who art in heaven, hallowed be thy name, thy kingdom come, thy will be done, on earth as it is in heaven, give us this day our daily bread, and forgive us our trespasses, as we forgive those who trespass against us, and lead us not into temptation, but deliver us from evil, for thine is the kingdom, the power, and the glory, forever and ever, amen."

6. In July 2021, Plaintiff finalized her divorce from her husband and was awarded full custody of their two children. Shortly thereafter, K.M. made the decision to stop attending church

services with his father as he had in the past and, since that time, has regarded himself as an agnostic who does not ascribe to any specific religious belief.

7. In August 2021, K.M. was selected to play wide receiver for the West Canaan High School freshman football team. Prior to joining the team, K.M. was unaware of Coach Kilmer's tradition of reciting the Lord's Prayer with the team before games.

8. During the first two games of his freshman season, K.M. joined his teammates in kneeling during the recitation of the prayer, but he did not recite the prayer along with Coach Kilmer and the other members of the team.

9. After the second game of the season, on Monday, September 6, 2021, K.M. approached Coach Kilmer and told Coach Kilmer that he was not comfortable reciting the prayer or kneeling before games with the team and requested that Coach Kilmer refrain from leading the students in prayer.

10. In that conversation, Coach Kilmer told K.M. that he had been "leading this team in prayer since [K.M. was] in diapers" and he was "not going to stop now."

11. Coach Kilmer further indicated that he did not think it would be fair to the other players on the team who wished to join in the prayer if he were to stop reciting it.

12. When K.M asked if he could stand or remain seated during the prayer, Coach Kilmer stated "it's a free country" and that it was "up to [K.M.]" but that "it would be best for team unity" if K.M. joined in the prayer as he had in the past. (Coach Kilmer was evidently unaware that K.M. had knelt without reciting the prayer before the first two games of the season.)

13. Before the third and fourth games of the season, K.M. knelt during the recitation of the prayer but did not recite it. On September 24, 2021, before the fifth game of the season, K.M. chose to remain seated during the prayer, and he did so before each subsequent game of the season.

14. In the locker room after one such game, outside of the presence of Coach Kilmer, one of K.M.'s teammates asked K.M. why he wasn't kneeling for the prayer and asked K.M. if he was a "heathen," prompting laughter from a number of other teammates.

15. Plaintiff sent a letter on October 23, 2021 to the principal of West Canaan High School and the superintendent of the District, copying Coach Kilmer. The letter reiterated K.M.'s request that Coach Kilmer cease from leading the prayer and asserted that his doing so violated the Establishment Clause of the First Amendment of the United States Constitution.

16. In response to the October 23 letter, a District representative contacted Plaintiff to express the District's disagreement that Coach Kilmer's behavior violated the Establishment Clause and to inform Plaintiff that the District would take no action with respect to Coach Kilmer's pregame prayer activity.

17. Further correspondence between Plaintiff and the District and their respective attorneys has failed to persuade the District to change its position or otherwise remedy the Establishment Clause violations alleged herein.

JURISDICTION AND VENUE

18. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiff's cause of action under 42 U.S.C. § 1983 arises under the laws of the United States.

19. Pursuant to 28 U.S.C. § 1391, venue is appropriate in this district because Plaintiff and K.M. are both residents of the Eastern District of Texasota, and the District is likewise situated in the Eastern District of Texasota.

CLAIM FOR RELIEF

Count I
(Injunction Under 42 U.S.C. § 1983)

20. Each of the foregoing allegations is hereby incorporated herein by this reference.

21. The District is a "person" acting under color of state law under 42 U.S.C. § 1983.

22. The District's policy of permitting Coach Kilmer to lead his players in the Lord's Prayer during the course of his official duties violates the Establishment Clause of the United States Constitution, as incorporated against Texasota and the District by the Fourteenth Amendment, including by fostering excessive entanglement between the District and the Christian faith and by creating what would be perceived by a reasonable observer as an official endorsement by the District of the Christian faith.

23. The District's policy has subjected K.M. to the deprivation of his rights under the First and Fourteenth Amendments of the United States Constitution.

WHEREFORE Plaintiff Maureen Moxon, as next friend of K.M., requests that the District be enjoined from permitting Coach Kilmer to continue his policy and practice of leading his players in the recitation of the Lord's Prayer before football games or otherwise; that the District and its agents be enjoined from leading students in prayer in the future; and such other and further relief as the Court deems just and proper.

Dated: March 15, 2022

Respectfully submitted,

/s/ *Julie Harbor*
Julie Harbor, Esq.
Freekos and People, P.C.
69 Flatbed Drive
West Canaan, Texasota 74142

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXASOTA

MAUREEN MOXON, as next friend to K.M., a minor child, Plaintiff, v. WEST CANAAN UNIFIED SCHOOL DISTRICT, Defendant.	No. 22-1999 VSY-BLS

MEMORANDUM AND ORDER

This matter comes before the Court on Plaintiff's motion for preliminary injunction under Federal Rule of Civil Procedure 65(a)(1). Based upon the agreement of the parties and given the lack of any significant dispute on the material facts in this matter, the Court has consolidated the preliminary injunction motion hearing with trial on the merits, *see* Fed. R. Civ. P. 65(a)(2), and issues this Memorandum and Order in support of its Judgment in this matter, which is entered this same day. Upon due consideration of the evidence and arguments adduced by the parties, the Court finds that Plaintiff has met her burden of proof on the sole count of her complaint and enters judgment in her favor.

I. Factual Findings

The material facts of this case are essentially uncontested and are accurately set forth in detail in Plaintiff's Complaint. In brief, Coach Bud Kilmer, the long-serving coach of West Canaan High School's freshman, junior varsity, and varsity football teams, has long had a tradition of inviting his players to kneel in the locker room before each football game and join him in reciting the Lord's Prayer, a well-known Christian prayer. K.M., the son and next friend of Plaintiff, who is a member of Coach Kilmer's freshman team and who hopes to join the junior varsity team next year, does not subscribe to the Christian faith (or any other faith).

After kneeling during the first two prayers recited during K.M.'s freshman season, K.M. asked Coach Kilmer to end his tradition of leading the players in prayer, but Coach Kilmer refused, telling K.M. that the tradition was longstanding and that he did not intend to stop. Although Coach Kilmer told K.M. it was "up to" him whether he participated in the prayer or not, Coach Kilmer told K.M. it would be "best for team unity" if K.M. participated in the prayer.

Subsequent to that conversation, Plaintiff sent a letter to the principal of West Canaan High School, the superintendent of Defendant West Canaan Unified School District, and Coach Kilmer, asserting that Coach Kilmer's practice of leading his players in prayer violated the Establishment Clause of the U.S. Constitution. Several letters were exchanged between the parties and their

attorneys thereafter. The parties' statements in these letters are varied and numerous, but the following passage in one of the District's letters succinctly summarizes the basic position taken by the District, which is consistent with the posture it has adopted in this litigation:

> Pregame prayers like the one being led by Coach Kilmer are not just a West Canaan tradition; similar prayers are commonly said in locker rooms all across the country and have been for generations. Coach Kilmer and the other members of his football teams also have their own free exercise rights under the First Amendment, which the District takes seriously. Thus, while [K.M.] remains free not to participate in the prayer if he does not want to, Coach Kilmer and the other players equally have the right to engage in such a traditional pregame prayer if they wish to.

Coach Kilmer has testified that he intends to continue leading his players in prayer before the games of the 2021 football season, and the superintendent of the District has testified that the District does not intend to take any actions to prevent Coach Kilmer from doing so. Plaintiff has also presented evidence that she is not the first to complain to Coach Kilmer or the District about Coach Kilmer's pregame prayers: both Coach Kilmer and the superintendent admitted in their testimony to having received complaints similar to Plaintiff's as early as 2002.

II. Conclusions of Law

A. Standing

Before reaching the merits of Plaintiff's Establishment Clause arguments, the Court must first address the threshold question of Plaintiff's standing. The District does not dispute that, under Texasota law, a parent such as Plaintiff who has sole custody over a minor child has standing to bring a claim for an injury suffered by that child. The District challenges, however, as a matter of this Court's Article III jurisdiction, whether Plaintiff's son has suffered an injury sufficient to convey standing.

The traditional test for standing requires a plaintiff to assert an "injury-in-fact" that is traceable to the conduct of the defendant and redressable by a favorable decision from a court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Ordinarily, this requires a plaintiff to allege a personal injury that amounts to more than a "generalized" interest in the law being enforced. *Id.* The Supreme Court has recognized, however, that some injuries, including those of a constitutional dimension, may be cognizable even if they do not result in some identifiable harm that can be readily measured in damages. *See Ass'n of Data Processing Servs. Org., Inc. v. Camp*, 397 U.S. 150, 153–54 (1970).

So too under the Court's Establishment Clause jurisprudence. *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (recognizing exception from the ordinary presumption against taxpayer standing in the context of an alleged Establishment Clause violation). Although the Court has occasionally required a plaintiff to allege a personal injury where, for example, the asserted violation of the Establishment Clause relates to a transfer of property by the government, *see, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982), it has not imposed that same requirement when examining noneconomic violations of the Establishment Clause, such as those presented by religious displays, *see, e.g.*, *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 620–21 (1989).

Here, Plaintiff asserts an injury on behalf of her son K.M., who was specifically invited and encouraged by his coach to participate in the religious exercise at issue, and who will be subjected to further religious displays if he remains on the football team and the Court does not grant the relief Plaintiff requests. That is enough to clear the minimal hurdle of plausibly alleging an "injury-in-fact" sufficient to create a "case" or "controversy" capable of judicial resolution. *Freedom from Religion Foundation, Inc. v. Cnty. of Lehigh*, 933 F.3d 275, 279 (3d Cir. 2019) ("In the Establishment Clause context, a community member . . . may establish standing by showing direct, unwelcome contact with a government display alleged to violate the Constitution." (internal quotations omitted)); *accord Felix v. City of Bloomfield*, 841 F.3d 848, 854 (10th Cir. 2016); *Montesa v. Schwartz*, 836 F.3d 176, 197 (2d Cir. 2016); *Doe v. Sch. Dist. of City of Norfolk*, 430 F.3d 605, 609 (8th Cir. 2003).

Likewise, Plaintiff has adequately demonstrated that the asserted Establishment Clause violation is traceable to the District's conduct and redressable by this Court. Plaintiff established that the District has received numerous complaints not only from Plaintiff but also from the parents of other children attending West Canaan High School, but it has not disciplined or trained Coach Kilmer as a result of his alleged violations of the Establishment Clause, nor has it otherwise acted to prevent them. As such, Plaintiff has demonstrated that the District has created a de facto policy of permitting Coach Kilmer to lead his players in reciting the Lord's Prayer. *See Monell v. N.Y. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). That is sufficient to satisfy Plaintiff's burden to show that the asserted violation is traceable to the conduct of the District and within this Court's power to redress.

B. The Establishment Clause

The first ten words of the Bill of Rights, known as the Establishment Clause, provide that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Although the original purpose of the Establishment Clause appears to have been to prevent the federal government from imposing a single religion upon the states, *see McGowan v. Maryland*, 366 U.S. 420, 440 (1961), the Court has since incorporated the Establishment Clause against the states through the Due Process Clause of the Fourteenth Amendment, *see Cantwell v. Connecticut*, 303 U.S. 296, 309 (1940). As a result, the states and their subunits (such as the District) are likewise prevented from "establishing" a state religion in violation of the Establishment Clause.

The Supreme Court set forth the rule to be applied to cases involving school-sponsored prayer in its landmark decision in *Engel v. Vitale*, 370 U.S. 421 (1962). In *Engel*, the Court struck down a short prayer recommended by the New York Board of Regents to be said at the start of each school day by students in the public school system that appealed to "Almighty God" for his "blessings." *Id.* at 421. Although the prayer was voluntary, the Court nonetheless held that "the constitutional prohibition against laws respecting an establishment of religion must at least mean that . . . it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by [the] government." *Id.* at 425.

Although the District seeks to distinguish it, *Engel* proves an insuperable obstacle for the District's position in this case. While the District emphasizes the voluntary nature of the prayer led by Coach Kilmer, that did not save the prayer in *Engel*, so it cannot save Coach Kilmer's prayer either. *See id.* at 424. The District also points to the language in *Engel* emphasizing that the prayer in *Engel* was "composed" and not merely led by school officials—but that distinction can hardly

help the District. Under the District's reasoning, *Engel* would have turned out the other way if, instead of the nondenominational prayer drafted by the Board of Regents, the school district had required teachers to lead their students in the Glory Be, the Fajr, or the Shema Yisrael. Such a change in the facts would have made the endorsement of religion that the *Engel* Court was concerned about more evident, not less. *Cf. Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 220 (1963) (following *Engel* and finding that practice of teacher-led recitation of the Lord's Prayer violated the Establishment Clause); *Borden v. Sch. Dist. of T'ship of E. Brunswick*, 523 F.3d 153, 165–66 (3d Cir. 2008) (upholding school district policy prohibiting football coach from leading students in prayer); *Roberts v. Madigan*, 921 F.2d 1047, 1055 (10th Cir. 1990) (upholding school district requirement that teacher refrain from reading Bible verses in his classroom).

The District's final "Hail Mary" rests on what it calls the "dilemma" presented by the Free Exercise Clause: that, if it were to prohibit Coach Kilmer from leading his students in prayer, it would violate the free exercise rights of Coach Kilmer and the players who might wish to participate in the prayer. The District further claims that its practice of permitting Coach Kilmer to lead his students in prayer does not show favoritism to any religion but simply reflects its respect for the religious beliefs of Coach Kilmer and those players who choose to join him in prayer.

This argument proves too much. Under this line of reasoning, a government entity could avoid violating the Establishment Clause simply by relying on the legally irrelevant distinction between itself and its agents. But Coach Kilmer was not merely acting as a private citizen making his own personal profession of faith; he was acting as an agent of the state leading a prayer in the course of his official duties. *Cf. Lee v. Weisman*, 505 U.S. 577, 587 (1992). Indeed, entities like the District can *only* act through their agents, and the law does not insulate them from liability for the acts of those agents when they are carried out pursuant to an official policy. *See Monell*, 436 U.S. at 694. If that were not the case, the school district could have defended itself in *Engel* by arguing that the decision to follow the Board of Regents' recommendation was made not by "the school" itself, but by school officials. Such a distinction is too fanciful to merit serious consideration.

C. Injunctive Relief

For the reasons set forth above, Plaintiff has met her burden of establishing a violation of the Establishment Clause by a preponderance of the evidence. The Court further finds that Plaintiff has adequately demonstrated that there is no adequate remedy at law (indeed, she has not even sought damages in this case); that, in the absence of an injunction, irreparable harm is likely to occur; and that balance of the equities indicates that the public interest supports entering the injunction requested by Plaintiff. *See Winter v. NRDC*, 555 U.S. 7, 20 (2008).

SO ORDERED this 11th day of April, 2022.

Creighton Meyers

THE HONORABLE CREIGHTON MEYERS
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXASOTA

MAUREEN MOXON, as next friend to K.M., a minor child, Plaintiff, v. WEST CANAAN UNIFIED SCHOOL DISTRICT, Defendant.	No. 22-1999 VSY-BLS

JUDGMENT

For the reasons set forth in this Court's Memorandum and Order entered this same day, judgment is entered in favor of Plaintiff on Count I, and the Court hereby enjoins the District and its agents as follows:

1. The District is hereby enjoined from permitting Bud Kilmer, or any other agent of the District acting in the course of their official duties, to lead students in prayer in connection with any school-sponsored activity, including but not limited to football games and practices; and

2. The District is hereby ordered to instruct Bud Kilmer to refrain from leading the West Canaan High School football team in any prayer, including but not limited to the Lord's Prayer, during the course of his official duties, and to monitor Bud Kilmer's compliance with said instructions.

3. This Court will retain jurisdiction to enforce this judgment by appropriate orders.

SO ORDERED this 11th day of April, 2022.

Creighton Meyers
THE HONORABLE CREIGHTON MEYERS
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXASOTA

MAUREEN MOXON, as next friend to K.M., a minor child, Plaintiff, v. WEST CANAAN UNIFIED SCHOOL DISTRICT, Defendant.	No. 22-1999 VSY-BLS NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that West Canaan Unified School District, Defendant in the above-captioned action, appeals to the United States Court of Appeals for the Twenty-First Circuit from the order of the United States District Court for the Eastern District of Texasota entered on April 11, 2022.

/s/ *Stubby Tanner*
Stubby Tanner, Esq.
Booth Law Firm
438 Camaro Drive
West Canaan, Texasota 74142

Dated: April 13, 2022

United States Court of Appeals
for the Twenty-First Circuit

No. 22-2P64

Maureen Moxon

Plaintiff-Appellee

v.

West Canaan Unified School District

Defendant-Appellant

Submitted: July 22, 2022
Filed: August 12, 2022

Before McNURTY, DARCY, and TWEETER, Circuit Judges.

DARCY, Circuit Judge.

Appellant West Canaan Unified School District (the "District") appeals from the judgment of the United States District Court for the Eastern District of Texasota, which entered an injunction against the District upon finding a violation of the Establishment Clause by the District. The District challenges both Plaintiff's standing to bring a claim for a violation of the Establishment Clause and the lower court's conclusion that the District's practice of permitting one of its high school coaches to lead his players in a pregame prayer violated that Clause. Although we agree with the district court that Plaintiff had standing to challenge the District's practice, we agree with the District that its practice does not violate the Establishment Clause. We therefore reverse.

I

The district court considered the District's argument below that Plaintiff lacked standing and rejected it, recognizing that controlling Supreme Court precedents permitted parties in positions analogous to Plaintiff's to raise Establishment Clause challenges. We agree and adopt the reasoning of the district court on this point in full. We express no opinion as to whether a plaintiff with a more tenuous connection to the challenged conduct, such as a student not on the football team or a member of the public attending a football game who observed similar conduct, would

have standing. Since, however, Plaintiff's son was personally invited to participate in the challenged prayer, we do not believe he qualifies as a mere "offended observer" as the District contends. Plaintiff therefore has standing to sue to vindicate her son's asserted rights.[1]

II

We turn next to the vexatious Establishment Clause question presented by this case. In doing so, we find ourselves at the intersection of two binding Supreme Court decisions that appear at first blush to point in different directions. The first, which the district court considered at length, is *Engel v. Vitale*, 370 U.S. 421 (1962), where the Court found that a voluntary prayer recommended by a public school board and led by public school teachers violated the Establishment Clause. *Id.* at 444. The second, which was decided after the district court rendered its judgment in this case, is *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), where the Court rejected a school district's claim that the Establishment Clause required it to discipline a football coach for performing a public display of prayer in contravention of school district policy. *Id.* at 2433. We are left with the unenviable task of reconciling these two precedents in order to decide this case.

Engel and *Kennedy* have certain attributes in common, both with each other and with this case. In each, public employees led the prayer in question—in *Engel*, it was teachers; in *Kennedy*, like this case, it was a football coach. And in each, the prayer was voluntary, meaning that students were free to join in the prayer or to refrain from doing so.

But that is largely where the comparisons end. In all remaining respects, this case is factually much closer to *Kennedy* than it is to *Engel.* One particular attribute is critical to our determination here: the posture assumed by the school district with respect to the prayer at issue. In *Engel*, the school district affirmatively endorsed the prayer by instructing its teachers to lead students in reciting it. *See Engel*, 370 U.S. at 421. In *Kennedy*, the district affirmatively barred the coach from engaging in the prayer and disciplined him for doing so. *See Kennedy*, 142 S. Ct. at 2418. And in both cases, the school district was found to have violated the First Amendment.

Here, however, the District has neither endorsed nor condemned the religious exercise of its employee and its students; instead, it has remained scrupulously neutral. *See Lee v. Weisman*, 505 U.S. 577, 589 (1992) ("The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."). It neither instructed Coach Kilmer to lead his players in prayer nor prohibited him from doing so. Instead, it has established a policy of permitting Coach Kilmer to engage in his own, personal display of religious belief and to invite (but not require) his players to participate in it if they wish. In so doing, the District avoided the compulsion—either of Coach Kilmer or his players—that *Kennedy* suggests is among the hallmarks of an Establishment Clause violation. *See Kennedy*, 142 S. Ct. at

[1] The complaint in this case did not allege that Plaintiff's own right to direct the education of her child was unconstitutionally impaired, as other plaintiffs have sometimes (unsuccessfully) argued. *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004) (finding father, who had no right under California law to sue as his daughter's next friend, lacked standing to raise Establishment Clause issue). We have therefore confined our analysis to Plaintiff's standing to raise a claim as "next friend" to her son, a minor over whom she has full custody.

2431; *accord Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) ("[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" (quoting *Zorach v. Clauson*, 343 U.S. 313, 314 (1952)).

Plaintiff urges us against this reasoning by arguing that *Kennedy* turned on the private, rather than official, nature of the coach's conduct. Plaintiff points out that the *Kennedy* Court emphasized the fact that the religious display in question occurred after the game was over, at a time when the coach was free to engage in any number of other non-religious activities that were not prohibited. *See Kennedy*, 142 S. Ct. at 2415.

That is a plausible reading of *Kennedy*, but we cannot see how it can be squared with other language in the decision. In *Kennedy*, the Court analogized the coach's prayer to an aide saying a blessing before a meal in the cafeteria, a Jewish teacher wearing a yarmulke to school, or a Muslim teacher wearing a headscarf during her class sessions. *See id.* at 2425, 2431. If, as *Kennedy* implies, a school district would run afoul of the Establishment Clause by banning any of those examples, which obviously take place while the employee is not only "on duty" but also directly engaged, at least in the latter two cases, in the performance of their official duties, then it is hard to see why the difference in timing between the coaches' prayers in *Kennedy* and this case would be decisive. *Cf. Freshwater v. Mt. Vernon City Sch. Dist. Bd. of Ed.*, 1 N.E.3d 335, 353 (Ohio 2013) (upholding teacher's personal display of Bible on his desk in his classroom during school hours).

Plaintiff also argues that *Kennedy* can be distinguished on the basis that, unlike the instant case, none of the coach's players joined in any of the prayers for which the coach was disciplined. *See Kennedy*, 142 S. Ct. at 2430. That is true, and it is equally true that the *Kennedy* Court did not have occasion to opine on the constitutionality of the earlier occasions on which the coach led his own players in prayer.[2] But again, we do not see this as a viable basis for distinguishing the instant case from *Kennedy*. So long as the prayer remains voluntary, we do not see how the independent decision of other students to either join in or refrain from participating in the prayer can affect its constitutionality. *See Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (1992) ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday."). Those students have First Amendment rights equal to Coach Kilmer's and K.M.'s, and as such, their exercise of those rights cannot serve as a sensible dividing line.

"[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe*, 530 U.S. at 302. The prayer recited by Coach Kilmer was not officially endorsed by the District, nor did Coach Kilmer use his official position to compel

---

[2] Although the *Kennedy* opinion indicates that Coach Kennedy had previously led his own players in prayer, he halted that practice after being so instructed by the school district. *See Kennedy*, 142 S. Ct. at 2417. The prayers for which the school district disciplined Coach Kennedy, and those whose constitutionality the Court addressed, were joined in one case by the opposing team and in another by other members of the public, but not by Coach Kennedy's own players. *See id.* Even on the earlier occasions where Coach Kennedy led his own players in prayer, however, the prayers were voluntary. *See id.* at 2416. The Court did not pass upon the constitutionality of those earlier prayers.

any of his players to participate. Those key features make the prayer in this case voluntary, private speech, which the District is neither free to endorse under the Establishment Clause nor prohibit under the Free Exercise Clause. To find otherwise would be to place school districts in a "vise between the Establishment Clause on one side and the . . . Free Exercise Clause[] on the other." *Kennedy*, 142 S. Ct. at 2427. Instead, as the Supreme Court has instructed us, we should view the clauses as "complementary." *Id.* Doing so here, we find that the District's policy of neutrality towards voluntary prayers such as Coach Kilmer's fully comports with the requirements of the Establishment Clause.

III

For the aforementioned reasons, the judgment of the district court is REVERSED and the case is remanded for further proceedings consistent with this opinion.

TWEETER, J., concurring in part and concurring in the judgment.

I join in full in Parts II and III of the Court's opinion holding that the district court erred in finding that the District's policy of permitting Coach Kilmer to lead a pregame prayer among those players who wished to participate violated the Establishment Clause. I, however, would not even reach that question, because I agree with the District that, after *Kennedy*, parents of students such as Plaintiff do not have standing to raise an Establishment Clause claim as the next friend of an "offended observer." I would therefore reverse the district court and remand with instructions to dismiss for lack of standing. *See Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 615 (2007).

In its more thoughtful moments, the Supreme Court has dismissed Establishment Clause claims for lack of standing where plaintiffs alleged nothing more than a generalized objection to government conduct with which they disagreed, *Allen v. Wright*, 468 U.S. 737, 754 (1984), which is ordinarily insufficient to satisfy the "case" or "controversy" requirement of Article III. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). In other cases, the Supreme Court has sometimes seen fit to hear Establishment Clause challenges in cases where the plaintiffs alleged little more than that they took offense to the religious displays at issue. *See, e.g.*, *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 579 (1989) (entertaining challenge to display of Christmas tree on public property). In those cases, however, the Court has generally not confronted the standing question and has rather assumed the plaintiff's standing *sub silentio*, which Justice Gorsuch has rightly characterized as mere "drive-by jurisdictional rulings" that carry "no precedential effect." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., concurring).

As Justice Gorsuch, who authored the *Kennedy* opinion, explained in his *American Legion* concurrence, the Court's seeming willingness to leapfrog the ordinary standing requirements of Article III for Establishment Clause cases was an outgrowth of its overbroad interpretation of that Clause in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Am. Legion*, 139 S. Ct. at 2101 (Gorsuch, J., concurring). In *Lemon*, a plurality of the Court broadly portrayed the Establishment Clause as prohibiting government conduct that fostered an "excessive entanglement" between government and religion, which in time grew to include considerations of whether a "reasonable observer" might view the display as an "endorsement" of a particular religion or religious belief, even where

no other concrete injury was alleged. *Id*. at 2100. But as *Kennedy* makes clear, the Court has put the final nail in *Lemon*'s coffin and "its endorsement test offshoot," *Kennedy*, 142 S. Ct. at 2427, and it no longer controls our consideration of cases such as this.

Thus, after *Kennedy*, although "a public school student compelled to recite a prayer . . . still ha[s] standing to sue," *Am. Legion*, 139 S. Ct. at 2103 (Gorsuch, J., concurring), there is no longer a special cause of action under the Establishment Clause for a plaintiff asserting a "modified heckler's veto," *Kennedy*, 142 S. Ct. at 2426, over a religious display. That is all Plaintiff asserts here. Had her son been forced to participate in Coach Kilmer's prayer, or had he experienced some official retaliation for his refusal to participate, that might well give rise to a separate claim for violation of his own Free Speech or Free Exercise rights. *See Town of Greece v. Galloway*, 572 U.S. 565, 586 (2014) ("It is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise."). But given the voluntary nature of the prayer at issue, Plaintiff's son is little more than a bystander observing, even under Plaintiff's own theory, government conduct with which he disagrees. That has always been insufficient to convey Article III standing in every context outside the Establishment Clause, and we should not make the mistake of lowering the jurisdictional bar simply because of a desire to reach the merits of this case. Instead, we should heed Justice Gorsuch's advice in *American Legion* and "begin to close" the "gaping hole" that *Lemon* "tore in standing doctrine in the courts of appeals." *See Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring).

McNURTY, J., concurring in part and dissenting in part.

I concur in Part I of the Court's opinion recognizing the standing of Plaintiff to challenge the serious violation of the Establishment Clause reflected in this case. But I cannot concur in the Court's disregard for the Supreme Court's binding decision in *Engel v. Vitale*, 370 U.S. 421 (1962), which squarely controls this case. The Supreme Court may have squeezed the last bit of life out of the *Lemon* test in *Kennedy*, but it did not overrule *Engel*, which predated *Lemon* by nearly a decade and remains among the Court's most important Establishment Clause precedents.

The majority does not dispute that *Engel* remains a binding precedent that we are duty-bound to follow. Instead, it distinguishes *Engel* as being less on-point than *Kennedy*—but it is not at all clear why that is the case. Aside from superficial differences (e.g., *Kennedy* and this case both involve football coaches), the material facts of this case plainly point to *Engel* as being the readily applicable precedent. In *Engel*, the Court squarely held that it violates the Establishment Clause for a public school employee to lead a prayer as part of a school-sponsored religious exercise. *See Engel*, 370 U.S. at 44. Although it is true that the prayer in *Engel* was also written by school board officials, the district court below cogently explained why that distinction is a mark against the District, not for it.

Kennedy, meanwhile, was a Free Exercise Clause case which turned on a single, central question: whether Coach Kennedy's practice of kneeling to pray at the fifty-yard line after games was an example of "private speech" or "government speech." *See Kennedy*, 142 S. Ct. at 2424. The Court devoted multiple parts of its opinion to discussing that question, referring to Coach Kennedy's actions as being of a "private" nature no less than 20 times. *See, e.g.*, *id.* at 2425 ("[I]t seems clear to us that Mr. Kennedy has demonstrated that his speech was *private* speech, not government speech." (emphasis added)); *id.* at 2429 (referring to "Kennedy's *private* religious

exercise" (emphasis added)). In emphasizing the importance of that distinction, the Supreme Court distinguished Coach Kennedy's speech in numerous ways that cannot be said to describe Coach Kilmer's actions in this case:

> When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. . . . He did not speak pursuant to government policy. . . . He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy's prayers did not "owe their existence" to Mr. Kennedy's responsibilities as a public employee.

Id. at 2424 (internal citations and emendations omitted). Coach Kilmer's prayer was not a "silent" and "brief prayer of thanks" made during a period when coaches and players "were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters." *Id.* at 2415, 2418. Coach Kilmer actively invited and encouraged his players, including K.M. specifically, to participate in a prayer before each football game, at a time when they were a captive audience, and where there was undoubtedly immense social pressure on the students at least to kneel if not to say the prayer out loud, as K.M.'s own experience shows. *See Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("[P]rayer exercises in public schools carry a particular risk of indirect coercion. . . . [P]ublic pressure, as well as peer pressure . . . though subtle and indirect, can be as real as any overt compulsion."). To make matters worse, Coach Kilmer then converted that social pressure into official pressure when he told K.M. that it would be "best for team unity" if he participated in the prayer, a fact that was lacking in *Kennedy*. *See Kennedy*, 142 S. Ct. at 2416 (noting that Coach Kennedy "never told any student that it was important they participate in any religious activity" and "never pressured or encouraged any student to join" his prayers).

The circumstances here demonstrate that Coach Kilmer's actions were not "private speech" like Coach Kennedy's, but speech pursuant to Coach Kilmer's official duties, which is the critical legal distinction at the center of the *Kennedy* decision. *See Kennedy,* 142 S. Ct. at 2434–35 (Alito, J., concurring) ("[Coach Kennedy's] expression occurred while at work but during a time when a brief lull in his duties apparently gave him a few free moments to engage in private activities. When he engaged in this expression, he acted in a purely private capacity."). Once that distinction is recognized, *Engel* again appears as the governing precedent, which plainly prohibits a public employee from leading a prayer during a school-sanctioned activity. *See Engel*, 370 U.S. at 444; *cf. Santa Fe Ind. School Dist. v. Doe*, 530 U.S. 290, 317 (1992) (finding that prayer chosen and recited by student over stadium loudspeaker before football games was government speech endorsing religion prohibited by the Establishment Clause). To hold otherwise would be to follow not the holding in *Engel*, but the lone dissent of Justice Stewart, who would have upheld the prayer at issue in that case simply because it was voluntary. *See Engel*, 370 U.S. at 445 (Stewart, J., dissenting) ("I cannot see how an 'official religion' is established by letting those who want to say a prayer say it."). As an inferior federal court, that is beyond our power to do.

For these reasons, I respectfully dissent.

THE SUPREME COURT
OF THE UNITED STATES

Maureen Moxon, as next friend of K.M., a minor child, Petitioner, -against- WEST CANAAN UNIFIED SCHOOL DISTRICT, Respondent.	ORDER GRANTING CERTIORARI Case No. 22-105

BROWN, C.J.

An application having been made for certiorari from the judgment entered by the Twenty-First Circuit Court of Appeals, dated August 12, 2022,

ORDERED, that said petition for certiorari is GRANTED and the following issues are certified for argument in this Court:

(1) Whether the parent of a student who refuses to participate in a prayer led by an on-duty public school employee has standing, as next friend of her child, to assert a violation of the Establishment Clause; and

(2) Whether it is a violation of the Establishment Clause for a public school district to permit an employee to lead a prayer among students participating in a school-sponsored activity.

Wendell Brown

Hon. Wendell Brown
Chief Justice of the Supreme Court
of the United States

Dated: August 31, 2022