No. 21-418

IN THE
Supreme Court of the United States

JOSEPH A. KENNEDY,
Petitioner,
v.
BREMERTON SCHOOL DISTRICT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Alabama Center for Law and Liberty is a conservative public-interest organization based in Birmingham, Alabama, dedicated to the defense of limited government, free markets, and strong families.

ACLL has an interest because it believes that the Establishment Clause of the First Amendment does not prohibit public employees from praying or publicly acknowledging God in a noncoercive way. Because it believes that history is more relevant to constitutional interpretation than precedent, ACLL believes that this Court should take the opportunity to examine the history of public prayer by public servants in examining whether the Establishment Clause prohibits such actions.

Moreover, notable cases involving noncoercive public prayer or acknowledgments of God have arisen from Alabama in recent years. *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Establishment Clause challenge to moment of silence in Alabama public schools); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) (offended observer challenge to 10 Commandments monument in Alabama judicial

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

building). As recently as 2018, the people of Alabama amended their constitution to reaffirm their commitment to the right to worship God and publicly acknowledge Him in a noncoercive way. Ala. Const. of 1901, art. I, § 3.02. Because Alabama remains firmly committed to upholding these rights, and because this case will have a direct bearing on the people of Alabama's ability to exercise those rights, ACLL has a strong interest in this case.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision below was based on an older jurisprudence and failed to adequately account for newer developments in the law that focus primarily on history and tradition. After this Court's plurality decision in *American Legion v. American Humanist Association*, which had four justices focusing on history and two justices concurring in the result agreeing with that point, the most relevant inquiry is whether there is a tradition of voluntary public prayer that is deeply rooted in this nation's history and traditions.

As the Justices of this Court have observed time and time again, the answer is yes. Beginning (at least) with the Declaration of Independence and continuing through modern times, our government has continued the practice of asking God to bless the Nation. We see this in prayers opening Congress each day, the invocations of or for Presidents, and the opening of Court each day at the U.S. Supreme Court. Consequently, there should be no reason why high school football coaches should not be allowed to

do the same as long as player participation is voluntary, as it was in this case.

If the historical analysis requires the Court to examine not only public prayer but its relation to football, then the analysis yields the same result. When football was created in the 19th century, prayer was a part of the sport because it was viewed as a way of developing the leadership and moral qualities of the college students that played on the teams. When prayer fell out of favor with the Ivy League college teams, it caught on quickly for other college teams, especially in the South. From there, it spread to professional football and high school football alike. It has remained a part of football from then until this day.

Because of the history of public prayer in this Country and even in the game of football itself, there is no Establishment Clause problem with Coach Kennedy praying after football games. Consequently, the judgment of the Ninth Circuit should be reversed. The Court should also render a judgment in favor of Coach Kennedy, ending years of litigation for him and settling the issue of prayer at public high school football games once and for all.

ARGUMENT

I. Under This Court's Most Recent Decisions, History Is the Dispositive Factor in the Establishment Clause Analysis.

The Ninth Circuit based its analysis on the endorsement test, which this Court has not used since 2005. *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1017 (9th Cir. 2021); *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005). But on the same day that *McCreary County* was decided, the Court issued another decision, *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality), the analysis of which was driven by "the nature of the [10 Commandments] monument and by our Nation's history." *Van Orden*, 545 U.S. at 686. Justice Breyer concurred in the result, noting that the monument had been around for a long time and that tearing it down would lead toward "the law exhibiting a hostility toward religion that has no place in our Establishment Clause traditions." *Id.* at 704 (Breyer, J., concurring in the result).

Since 2005, *Van Orden*'s rationale appears to have taken precedence over *McCreary County*'s. In 2014, this Court held: "Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014). In that case, while the majority did not define exactly what "with[standing] the critical scrutiny of time and political change" means, it did stress that any test

the Court adopts must "acknowledge a practice that was accepted by the Framers[.]" *Id.* at 577. Thus, of the two factors *Town of Greece* articulated, history was the dominant factor, just like in *Van Orden*.

The Court again invoked a historical analysis in preserving a World War I Peace Cross in *American Legion v. American Humanist Ass'n*, 139 S.Ct. 2067 (2019). The four-justice plurality, joined by two justices concurring in the result who agreed with this point, declined to apply the *Lemon* test but looked to history to guide its analysis. *Am. Legion*, 139 S.Ct. at 2080-82, 2087-89 (plurality); *id.* at 2096-98 (Thomas, J., concurring in judgment); *id.* at 2101-02 (Gorsuch, J., concurring in judgment). Thus, as the Eleventh Circuit observed by counting votes from *American Legion*, more than a majority of Justices have held that "history, tradition, and settled practice must at the very least be consulted—for 'guidance'—in deciding an Establishment Clause case[.]" *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1328 (11th Cir. 2020). The Eleventh Circuit also observed that "[a]pplying *American Legion* is … easier said than done; the Supreme Court's splintered decision spans more than 80 slip-opinion pages and comprises seven separate writings." *Id.* at 1329.

Perhaps observing that applying *American Legion* would be difficult, Justice Kavanaugh explained that there is an "overarching set of principles" in each type of Establishment Clause case, including "religious expression in public schools." *American Legion*, 139 S.Ct. at 2092-93 (Kavanaugh, J., concurring). Those principles are: "If the challenged

government practice is not coercive *and* if it is (i) rooted in history or tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation." *Id.* at 2093.

ACLL believes that the Court should go even further and examine such issues as whether the historical touchstone of Establishment Clause violations is coercion by force of law and threat of penalty, and whether the Establishment Clause should have been incorporated against the states. *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49-51 (2004) (Thomas, J., concurring in judgment).[2] But if the Court is unwilling to go that far in the present case, ACLL believes that, as Justice Kavanaugh observed in *American Legion*, the critical inquiries are whether (1) Coach Kennedy's practice was coercive and (2) if not, whether it was rooted in this Nation's history and traditions.

In this case, Respondents acknowledged that the students participated in Coach Kennedy's prayers voluntarily and that he had "not actively encouraged, or required, [student] participation." App.218

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[2] Although the Court cannot reach this issue in the present case, it should also consider Justice Gorsuch's argument that offended observers do not have standing to bring Establishment Clause challenges. *Am. Legion*, 139 S.Ct. at 2098 (Gorsuch, J., concurring in judgment).

(alteration in original). Thus, the question in this case is whether the type of praying in this case is "rooted in history or tradition." *Am. Legion*, 139 S.Ct. at 2093 (Kavanaugh, J., concurring). If it is, then there is no Establishment Clause violation.

II. Voluntary Public Prayer Is Deeply Rooted in This Nation's History and Traditions

A. The History of Public Prayer in America

As Justice Scalia's dissent in *Lee v. Weisman* demonstrates, the history of public prayer in this Country is indeed very deeply rooted. *Lee*, 505 U.S. at 632-36 (Scalia, J., dissenting). Because Justice Scalia did such a masterful job in his dissent of making the case, ACLL will reproduce those pages here:

> The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition. Illustrations of this point have been amply provided in our prior opinions, *see*, *e.g.*, *Lynch* [*v. Donnelly*, 465 U.S. 668,] 674-678 [(U.S. 1984)]; *Marsh v. Chambers*, 463 U.S. 783,] 786-788 [(U.S. 1983)]; *see also Wallace v. Jaffree*, 472 U.S. 38, 100-103 (1985) (Rehnquist, J., dissenting); *Engel v. Vitale*, 370 U.S. 421, 446-450, and n.3 (1962) (Stewart, J., dissenting), but since the Court is so oblivious to our history as to suggest that the Constitution restricts "preservation and transmission of religious beliefs . . . to

the private sphere," *ante*, at 589, it appears necessary to provide another brief account.

From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. The Declaration of Independence, the document marking our birth as a separate people, "appeal[ed] to the Supreme Judge of the world for the rectitude of our intentions" and avowed "a firm reliance on the protection of divine Providence." In his first inaugural address, after swearing his oath of office on a Bible, George Washington deliberately made a prayer a part of his first official act as President:

> "[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes." Inaugural Addresses of the Presidents of the United States, S. Doc. 101-10, p. 2 (1989).

Such supplications have been a characteristic feature of inaugural addresses ever since. Thomas Jefferson, for example, prayed in his first inaugural address: "[M]ay that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity." *Id.*, at 17. In his second inaugural address, Jefferson acknowledged his need for divine guidance and invited his audience to join his prayer:

> "I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations." *Id.*, at 22-23.

Similarly, James Madison, in his first inaugural address, placed his confidence

> "in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future." *Id.*, at 28.

Most recently, President Bush, continuing the tradition established by President Washington, asked those attending his inauguration to bow their heads, and made a prayer his first official act as President. *Id.*, at 346.

Our national celebration of Thanksgiving likewise dates back to President Washington. As we recounted in *Lynch*:

> "The day after the First Amendment was proposed, Congress urged President Washington to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God.' President Washington proclaimed November 26, 1789, a day of thanksgiving to 'offe[r] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech

> Him to pardon our national and other transgressions . . . .'" 465 U.S., at 675, n.2 (citations omitted).
>
> This tradition of Thanksgiving Proclamations—with their religious theme of prayerful gratitude to God—has been adhered to by almost every President. *Id.*, at 675, and nn.2 and 3; *Wallace v. Jaffree*, *supra*, at 100-103 (Rehnquist, J., dissenting).
>
> The other two branches of the Federal Government also have a long-established practice of prayer at public events. As we detailed in *Marsh*, congressional sessions have opened with a chaplain's prayer ever since the First Congress. 463 U.S., at 787-788. And this Court's own sessions have opened with the invocation "God save the United States and this Honorable Court" since the days of Chief Justice Marshall. 1 C. Warren, The Supreme Court in United States History 469 (1922).

As Justice Scalia indisputably demonstrated, public prayer is deeply rooted in our history and traditions, and it continues to be practiced through this day. The only reason why there has been confusion about this issue is because this Court has sometimes failed to interpret the Establishment Clause according to its history and original meaning. This sometimes leads to inconsistent results, such as Congress opening with a prayer, prayer at Presidential inauguration, and prayer as this Court

takes the bench, while many other Americans are not afforded the same privilege. But since the Court is now looking to history to guide its interpretation of the Establishment Clause, there can be no dispute that noncoercive public prayer is in fact deeply rooted in our history and traditions.

B. The History of Prayer and Football

Since the meaning of the Constitution is fixed by the text and original meaning of the Framers and Founding Generation, there is no reason to think that prayer at high school football games would be singled out for discriminatory treatment. Nevertheless, if additional analysis is needed about the history of prayer at football games, this section will attempt to provide that analysis.

Football was born in the Ivy League colleges of the Northeast in the late nineteenth century. Paul Putz, *Football and the Political Act of Prayer*, Religion & Politics (Aug. 28, 2018), https://religionandpolitics.org/2018/08/28/football-and-the-political-act-of-prayer.[3] From the beginning, some of its proponents saw football as "a way to

[3] Putz is the Director of the Faith & Sports Institute at Baylor University. *Paul Emory Putz*, PaulEmoryPutz.com, http://www.paulemoryputz.com (last visited Feb. 11, 2022). He "specialize[s] in the history of sports and Christianity in the modern United States[.]" *Research & Publications*, PaulEmoryPutz.com, http://www.paulemoryputz.com/research--publications.html (last visited Feb. 11, 2022). Putz's article, quoted above, has a spin on the facts that ACLL finds suspect. Nevertheless, ACLL has attempted to separate fact from opinion and report the useful facts to this Court.

develop the physical and moral characteristics" needed for future leaders, and therefore they practiced and publicized "football-related prayer." *Id.* While prayer eventually fell out of fashion with football in the Ivy Leagues, it caught on at other colleges in the 1920's, especially in the South and at Notre Dame, which was "the most dominant team of the decade." *Id.* The rise of "southern teams and Notre Dame to football prestige in the 1920's shifted the primary image of football-related prayer away from Ivy League elites and towards teams filled with rural, immigrant, and working-class players." *Id.*

Prayer in football "went national" after World War II, with the rise of "Under God" and "In God We Trust" emerging in response to the threat of communism. *Id.* Pop Warner leagues began using "huddle prayers" to open games, and college football games opened with prayers through the stadium's public address systems. *Id.* Collective prayer even began to bridge racial gaps in the NFL during this time. *Id.* In the 1960's-70's, the public prayers even began to serve as an evangelistic tool, yet still the tradition continued. *Id.*

The mid-1970's brought chaplains to nearly every NFL team. *Id.* At the college level, the Fellowship of Christian Athletes became an institution in college sports, especially football, in the 1980's. *See id.* In 1990, the first post-game prayer between two opposing teams emerged in the NFL between the New York Giants and San Francisco 49ers. *Id.* The tradition had already existed in college circles, but the NFL drew on it in creating what is now a well-

established tradition of post-game prayer. *Id.* As the Pro Football Hall of Fame acknowledges: "Most teams say a pre game [sic] prayer and opposing players of faith gather after a game at midfield to pray." *Faith and Football*, Pro Football Hall of Fame (Apr. 11, 2017), https://www.profootballhof.com/news/2017/04/faith-and-football.

Thus, as one commentator has observed, "Prayer at football games is a long-standing tradition[.]" Jeremy E. Warren, *Without a Prayer: The Status of School Prayer After Santa Fe Independent School District v. Doe*, 42 S. Tex. L. Rev. 925, 941 (2001) (citing Becky Bell, *Texas Ban on Football Prayer Going Ahead: Despite Appeals Court Ruling, Many School Districts Plan to Continue with Their Traditional Invocations* at A15, Atlanta J. & Const (Sept. 3, 1999)). Even after this Court's decision in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), Americans have still fought to find creative ways to allow prayer at public high school football games in a way that comports with this Court's precedents. *See, e.g.*, *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) (protecting voluntary student-led prayer and holding that such an approach comports with *Santa Fe*). Prayer at football games has been an unbroken tradition since its creation in the nineteenth century and remans so through this day.

In light of this history, Coach Kennedy's noncoercive public prayers after football games did not violate the Establishment Clause. Prayer has

been a part of football since its birth in the nineteenth century. That tradition continues this day in the National Football League, in college football, and in high school football across the country. Coach Kennedy's prayer was nothing unorthodox in light of the American football tradition, and this Court should recognize such.

CONCLUSION

The Ninth Circuit's decision was based on a jurisprudence that failed to take into account the last 17 years of Supreme Court precedent, which has "eroded" the older jurisprudence's "underpinnings." *Janus v. AFSCME*, Council 31, 138 S.Ct. 2448, 2482 (2018). Under this Court's more recent Establishment Clause decisions, the questions are whether the practices at issue are rooted in our Nation's history and traditions. Public prayer by public officials is very deeply rooted in our history and traditions, and prayer is also deeply rooted in the history of football in this Country. For all of these reasons, this Court should hold that Coach Kennedy's actions did not violate the Establishment Clause, reverse the judgment of the Ninth Circuit, and render a judgment in Coach Kennedy's favor.

Respectfully submitted,

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