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* DARRELL GREEN IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

This case presents two questions: (1) Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection. (2) Whether, assuming that such religious expression is private and protected by the Free Speech and Free Exercise Clauses, the Establishment Clause nevertheless compels public schools to prohibit it. This brief focuses on the second issue.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae*, Darrell Green, submits this brief supporting Petitioner.[1]

Darrell Green is a member of the Pro Football Hall of Fame. During his professional career in the National Football League, he played in three Super Bowls and set numerous NFL records. As a follower of Jesus, Mr. Green now engages in a wide variety of public service activities meeting the needs of children, their families and the communities in which they live. In doing so, Mr. Green's faith is often part of, and evident in, his motivational speeches and public expressions of encouragement.

Amicus Curiae holds special knowledge helpful to this Court about the importance of properly applying the plain meaning of the Establishment Clause. *Amicus Curiae* files this brief to encourage this Honorable Court to return to a sound constitutional basis for state-church relations and, in so doing, protect *all* those who seek to encourage and inspire the next generation of this great nation.

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[1] Petitioner and Respondents granted blanket consent for the filing of *Amicus Curiae* briefs in this matter. *Amicus Curiae* further states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the Great Lakes Justice Center, made a monetary contribution to the preparation or submission of this *Amicus Curiae* brief.

BACKGROUND

As a football coach, Mr. Kennedy's job included coaching, mentoring, and serving as a role model for the student athletes. Pet.App.3; JA168. In this regard, the foundation for Mr. Kennedy's personal identity and belief system was his Christian faith. *Id.* After each game, these sincerely held religious beliefs led him to kneel at midfield and "offer a brief, quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition." Pet.App.3-4. Sometimes Mr. Kennedy gave short motivational speeches through the lens of his personal identity and belief system. *Id.* at 4.

Players and members of the community sometimes voluntarily joined Mr. Kennedy at midfield. *Id.* at 4, 8-9. Even though nothing in the record shows that Mr. Kennedy treated anyone on the team more or less favorably if they participated or not, the government objected, ordering that his inspirational talks "must remain entirely secular in nature, so as to avoid alienation of any team member." *Id.* at 6. Condemning Mr. Kennedy's expression, as an improper endorsement of religion, it punished him. The government's actions ultimately resulted in Mr. Kennedy no longer being allowed to coach the football team. *Id.* at 10-11.

The government acknowledges that it substantially interfered with Mr. Kennedy's First Amendment liberty. It seeks to justify its violation, however, arguing that allowing Mr. Kennedy to express himself through the lens of his belief system would violate the Establishment Clause. *Id.* at 17, 23.

SUMMARY OF THE ARGUMENT

The government's contention that its substantial interference with Mr. Kennedy's First Amendment liberty was justified cannot stand. Contending the government had a compelling interest justifying its infringement, the appellate court incorrectly presupposed that not stopping Mr. Kennedy from praying would violate the Establishment Clause. This Court should apply the plain meaning of the words in the Establishment Clause in its review of the government action here. The Establishment Clause simply prohibits federal laws "respecting an establishment of religion." U.S. Const. amend. I. Mr. Kennedy praying does not establish a religion. It does not subject the American citizenry to governance under a theocracy. It does not coerce the American citizenry, by force of law and penalty, to practice an official religion. It does not, therefore, violate the plain meaning of the Establishment Clause. The government, therefore, lacked a compelling interest justifying its substantial infringement of Mr. Kelly's First Amendment liberty.

Amicus Curiae additionally urge this Court to overrule *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its progeny relied upon by the appellate court, because it unconstitutionally empowers unelected judges to supplant our politically accountable system of governance with their own protean preferences. This Court's judicially contrived secular purpose and religious endorsement prohibition: 1) exceeds the scope of judicial power stated in Article III of the Constitution; 2) bypasses constitutionally required

processes for amending the Constitution; 3) undermines the legitimacy of the judiciary; 4) creates substantial unpredictability in the law; and 5) fosters unjustifiable hostility toward the religious identity and dignity of innumerable U.S. citizens.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS MR. KENNEDY'S PRAYER AND, UNDER A CORRECT UNDERSTANDING OF THE ESTABLISHMENT CLAUSE, DOES NOT PROVIDE JUSTIFICATION FOR THE GOVERNMENT'S SUBSTANTIAL INFRINGEMENT OF HIS CONSTITUTIONALLY PROTECTED LIBERTY.

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech . . . ." U.S. Const. amend. I.

A. In Resolving this Case and Controversy, the Court Should Apply the Plain Meaning of the Words in the Establishment Clause.

The Constitution is not just a set of guidelines. It is the framework on which the government and our legal system are constructed. Its words both create this Court's authority and give it definition. Those words were written quite clearly, by highly qualified draftsmen, to express a simple meaning. Faithful adherence to those words is the touchstone for measuring the fulfillment of this Court's sacred duty. Every Justice who takes the oath of office swears to uphold the Constitution as it is written, not as he or

she would like it to be written. Discerning and applying the meaning that the Drafters embodied in the Constitution's language is this Court's high calling. The alternative of making those words mean what contemporary judges think they should now mean is the first step on the path to tyranny.

In this case, the appellate court recognized that the government substantially interfered with Mr. Kennedy's constitutionally protected First Amendment liberties. The appellate court, therefore, properly applied strict scrutiny to the government's action. Pet.App.17 (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001)); Pet.App.23 (citing *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 531-32 (1993)). In doing so, however, the appellate court erroneously held that the government had a compelling interest justifying its substantial constitutional infringement. Pet. App - 17-25. To reach this conclusion, the appellate court incorrectly presupposed that not stopping Mr. Kennedy from praying would violate the Establishment Clause. *Id.* Reasoning from its incorrect presupposition, the appellate court concluded that the government held a compelling interest in avoiding such a violation. *Id.*

Resolution of the issue before this Court requires a correct understanding of what the Establishment Clause means. This Court has long sought to honor this duty by understanding those meanings in their historical context. In evaluating the appellate court's interpretation of the Establishment Clause, this Court should ask whether the interpretation comports with "what history reveals was the contemporaneous

understanding of its guarantees." *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

As Chief Justice Burger observed in *Marsh v. Chambers*, "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied...." 463 U.S. 783, 790 (1983). Reviewing the history of the Clause and its application, the *Marsh* Court held that a chaplain (employed by the government) did not violate the Establishment Clause by leading a legislature in prayer. *Id.* This Court in *Greece v. Galloway*, 572 U.S. 565, 573 (2014), thereafter noted that

> *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. 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. *County of Allegheny*, supra, at 670 (opinion of Kennedy, J.); *see also School Dist. of Abington Township v. Schempp*, 374 U. S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers").

Similarly, in *Lee v. Weisman*, Justice Scalia, joined by three other justices, stated that in this search for truth, "the meaning of the Clause is to be determined by reference to historical practices and understandings."

505 U.S. 577, 631 (1992) (Scalia, J., dissenting). Various Justices, in numerous cases, have, in detail, documented the history and tradition of public prayer in the United States. *See*, *e.g.*, *Lee*, 505 U.S. at 633-36; *Marsh*, 463 U.S. at 786-88; *Lynch*, 465 U.S. at 674-78; *Engel v. Vitale*, 370 U.S. 421, 446-50, n. 3 (1962) (Stewart, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 100-03 (1985).

Moreover, Webster's 1828 American Dictionary of the English Language defined *respecting* as "[r]egarding; having regard to; relating to,"[2] and *establishment* as "[t]he act of establishing, founding, ratifying or ordaining."[3] Thus, historically, the plain meaning of the Establishment Clause is that government should not shackle the consciences of the people, for whose sake it exists, through a state religion. The experience of our Founders, which the Establishment Clause reflects and seeks to save us from, was aptly delineated by Justice Scalia, dissenting in *Weisman,* 505 U.S. at 640-41 (internal citations omitted):

> The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*. Typically,

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[2] Noah Webster, *Am. Dictionary Of The English Language* (1828), at http://webstersdictionary1828.com/Dictionary/respecting, (last visited Feb. 24, 2022).

[3] Noah Webster, *Am. Dictionary Of The English Language* (1828), at http://webstersdictionary1828.com/Dictionary/establishment, (last visited Feb. 24, 2022).

> attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. Thus, for example, in the colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.

Government acknowledgment and accommodation of religious expressions are considered time-honored practices that are a part of our nation's heritage. *See Marsh*, 463 U.S. at 790 (upholding prayer in legislature); *Lee*, 505 U.S. at 631 (Scalia, J. dissenting); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 657, 670 (1989) (Kennedy J., dissenting).

> The Establishment Clause must be construed in light of the '[g]overnment policies of accommodation, acknowledgment, and support for religion [that]are an accepted part of our political and cultural heritage.'… the meaning of the Clause is to be determined by reference to historical practices and understandings.' It is said that '[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.'

Lee, 505 U.S. at 631 (Scalia, J. dissenting) (quoting *County of Allegheny*, 429 U.S. at 657, 670).

Properly understood, the "separation of church and state is not a limitation on churches or religion; it is a limit on the role of government with respect to churches and religious life in general." Michael W. McConnell, *Religion and its Relation to Limited Government,* 34 Harv. J.L. & Pub. Pol. 943, 944 (2010).

Mr. Kennedy praying does not violate the Establishment Clause because it was not an action regarding or relating to the act of establishing or founding of a religion or state church. The praying coach does not subject the American citizenry to governance under a theocracy. Nor does it coerce the American citizenry, by force of law and penalty, to practice one official religion to the exclusion of all others. Mr. Kennedy's praying does not, therefore, violate the Establishment Clause.

B. This Court Should Abandon the Endorsement Jurisprudence used by the Appellate Court in Interpreting the Establishment Clause.

The government demanded that Mr. Kennedy's post-game expression "must remain entirely secular in nature" Pet.App.6. The appellate court held, *inter alia*, that the government's not stopping Mr. Kennedy from praying would violate the Establishment Clause, because not stopping it endorsed religion. Pet.App.1-2, 17-23. To understand the gravity of the government's and appellate court's error, it is necessary to understand its ancestorial jurisprudence. Indeed, the

appellate court's error is understandable given that this Court's "religion clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test." *Lee,* 505 U.S. at 644 (Scalia, J., dissenting). The test often ignored but not yet overruled by this Court, regularly continues to receive "well-earned criticism." *Id.*

In *Lemon*, and its progeny relied upon by the appellate court, this Court replaced the rule prescribed by the Constitution – whether government action "established" a religion – with a test of its own creation, whether government action had a secular purpose or "endorsed" religion. *Lemon*, 403 U.S. at 612-13 (1971); *see also* Pet.App.17-23 citing *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 and quoting *Wallace*, 472 U.S. at 73, 76 (O'Connor, J., concurring in judgment)); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring).

In *Lemon*, the Court contrived a three-part test, and then mandated that government action must satisfy all three elements to comport with the Establishment Clause:

> First, the [government action] must have a secular [ ] purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the

> [government action] must not foster an excessive government entanglement with religion.

Lemon, 403 U.S. at 612-13 (internal citations omitted).

A few justices addressed the second prong of the *Lemon* test by requiring the government action to not even symbolically endorse religion. No agreement existed though, even among those justices, on how to decide when a government action symbolically endorsed religion. For example, Justice O'Connor, concurring in *Wallace v. Jaffree* stated:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. *** The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion].

472 U.S. at 76 (quoting *Lynch*, 465 U.S. at 693-94).

Elsewhere she stated that: "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Pinette*, 515 U.S. at 773 (O'Connor, J., concurring).[4]

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[4] Compare Justice O'Connor's measure with that of Justice Souter, who opined that he "attribute[s] these perceptions of the intelligent observer to the reasonable observer of Establishment Clause analysis…, where I believe that such reasonable perceptions matter." *Pinette*, 515 U.S. at 786 (Souter, J., concurring). Likewise, Justice Stevens articulated a less informed "reasonable person" standard to determine whether an endorsement of religion exists when addressing the second prong in *Lemon*: If a reasonable person could perceive a government endorsement of religion from

Citing *Lemon's* progeny in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000), the appellate court relied on Justice O'Connor's version of the endorsement test in the case at bar. Pet.App.18-19:

> Guided by *Santa Fe*, we ask whether an objective observer familiar with the history... would view BSD's allowance of that activity as "stamped with [his or] her school's seal of approval." *Id.* at 308 quoting *Wallace*, 472 U.S., at 73, 76 (O'Connor**,** J., concurring in judgment) and *Pinette*, 515 U.S. at 777 (1995) (O'Connor**,** J., concurring in part and concurring in judgment).

Thus, from *Lemon* and its progeny evolved the *endorsement* analysis and application relied upon by the appellate court.

After a pugilistic presentation of the facts, the appellate court concluded that "an objective observer could reach no other conclusion than that the government endorsed Kennedy's religious activity by not stopping the practice." Pet.App.21

"In sum, there is no doubt that an objective observer, familiar with the history... would view his demonstrations as BSD's endorsement of a particular

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a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect nonadherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe. *Id.* at 799 (Stevens, J., dissenting).

faith. For that reason, BSD had adequate justification for its treatment of Kennedy." Pet.App.22-23.

The appellate court's reliance on *Lemon's* progeny ignored the plain meaning of the words in the Clause. When the Drafters wrote the Establishment Clause, they well knew the meanings of both "establish" and "endorse." They chose "establish" to express their intent. If they had meant "endorse," there is no doubt they would have used that word. They did not. *Lemon,* and its progeny relied upon by the appellate court, should not have altered the meaning of the Establishment Clause, and this Court should correct that error.[5]

Amicus Curiae urges this Court to reverse *Lemon* and its secular purpose and endorsement test progeny used by the appellate court because these decisions extra-constitutionally permit changeable political preferences of unelected judges to substitute their politically unaccountable will for the politically accountable governance guaranteed by the Constitution.

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[5] Moreover, when determining the constitutionality of a government action under *Lemon,* the content of the government action is irrelevant. Instead, the *Lemon* test requires that a judge make a subjective assessment as to whether the government actor had a secular purpose (*i.e.*, the judge may indulge in relatively unconstrained speculation regarding another government official's state of mind, and subjectively conclude whether the government actor had a secular purpose). If the judge feels there was not a secular motive, the judge must hold that the government action violates the Establishment Clause.

As analyzed below, *Lemon's* "secular purpose" and "no symbolic endorsement" policies: 1) exceed the scope of judicial power granted in Article III of the Constitution; 2) bypass constitutionally required processes for amending the Constitution; 3) undermine the legitimacy of the judiciary; 4) create substantial unpredictability in the law; and 5) foster unjustifiable hostility toward the religious identity and dignity of numerous United States citizens.

1) The Appellate Court Exceeded the Scope of the Judicial Power

Lemon's test, as evolved by its progeny, exceeds the scope of judicial power stated in Article III of the Constitution. In pertinent part, Article III of the Constitution provides that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish... The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

U.S. Const. art. III, §§ 1-2.

The appellate court, like *Lemon* before it, conspicuously failed to identify any legitimate source of constitutional authority on which it relied when amending the meaning of the Establishment Clause. The simple reason *Lemon* and its progeny failed to do

so is that no enumerated judicial power exists for the judiciary to amend the Constitution.

> The Federal Government "is acknowledged by all, to be one of enumerated powers." That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. . . . The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it."

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (internal citations omitted) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 404-05 (1819)); U.S. Const. art. I, § 8, cls. 5, 7, 12; *Gibbons v. Ogden*, 9 U.S. 194-95 (1824).

Nothing in Article III empowers the Court to change or "evolve" the Constitution. Moreover, nothing in *Marbury v. Madison*'s ubiquitous assertion that it is the province of the Court to say what the law is, empowers the Court to say instead what it prefers the law to be. 5 U.S. 137 (1803).

Lemon, and its progeny relied upon by the appellate court, venture far beyond the scope of its Article III powers. Such a venture improperly permits the political preferences of unelected judges to amend the Establishment Clause. *Lemon* rewrites "make no law

respecting an establishment of religion" to instead require that "every government action have a secular purpose and not even symbolically endorse religion." 403 U.S. at 612-13. All because a panel of unelected Justices preferred it so.

2) The Appellate Court, Substituting Endorsement as Establishment, Bypassed Constitutionally Required Processes for Amending the Constitution

In amending the meaning of the words in the Establishment Clause, *Lemon* and its progeny bypassed constitutionally required political processes that specifically require involvement of politically accountable state legislatures. Article V of the Constitution, in pertinent part, provides:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. . . .

U.S. Const. art. V.

Although the judicial branch may hold the power to say what the provisions of the Constitution mean, that

power does not extend to amending or evolving the meaning of these provisions. That power is delegated to the politically accountable branches of government in Article V. Thus, when *Lemon* amended the meaning of the Establishment Clause, it usurped legislative authority contrary to the express provisions in Article V.

3) Lemon, and its Progeny Relied upon by the Appellate Court, Undermines the Legitimacy of the Judiciary

When a court steps beyond its limited duty and usurps legislative authority, as the Court did in *Lemon*, it undermines good governance under the Rule of Law and its own legitimacy. To test the provisions of a government action against the Constitution is one thing; imposing a new meaning on the words of the Constitution to achieve a judicially preferred outcome or social policy is another.

Those supporting *Lemon,* and its progeny relied upon by the appellate court, wrongly see the Constitution as an evolving organism, the meaning of which they believe their office empowers them to actively manipulate. They become Platonic Philosopher Kings, ruling by judicial fiat, unbound by the constraints of the Constitution's actual language. *Lemon's* evolving endorsement prohibitions embed this tyrannical principle in our constitutional jurisprudence by allowing judges to make subjective, ad hoc assessments as to whether a government actor had a secular purpose or acted in a way endorsing a religion.

In this case, Respondents contend Mr. Kennedy's prayer violates an interpretation of the Establishment Clause distorted by *Lemon's* progeny. They ask this Court to uphold the Ninth Circuit's subjective application of this Court's judge-made Establishment Clause doctrine banning government actions that might "endorse" religion.

Lemon's progeny, and its evolving endorsement prohibition, makes a litigant's success in judge-shopping the best indicator of whether a law will be struck down under the Establishment Clause. This Court should, therefore, overrule it.

If this Court's judicially manufactured Establishment Clause doctrine existed during the Lincoln Administration, the Emancipation Proclamation would be unconstitutional because Lincoln expressly invoked "the gracious favor of Almighty God" in the text of the proclamation.[6] Our nation was founded in the midst numerous public expressions of prayer, and has survived over two centuries of them, and there is undeniably no national religion that has been established by this practice.

4) This Court's Establishment Clause Jurisprudence Creates Substantial Unpredictability in the Law

Lemon, and its progeny cited by the appellate court, also undermines predictability, a vital component of

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[6] Abraham Lincoln, Emancipation Proclamation, (Jan. 1, 1863), https://catalog.archives.gov/id/299998?q=Emancipation%20Proclamation#.Vflu0VtrT7w.link (last visited Feb. 24, 2022).

good governance under the Rule of Law. When it comes to judicial review of government action and the Establishment Clause, the subjective nature of *Lemon's* evolving jurisprudence produces inconsistent judicial precedents. This inconsistency is inevitable because judges utilizing *Lemon* make a personal subjective assessment as to whether they happen to believe a government actor had a secular motive or endorsed religion - rather than looking to the content of the action itself. Inconsistent judicial precedents lead to unpredictability in the law. The inconsistent precedents produced by *Lemon's* subjectivist jurisprudence provide no useful guidance for government officials trying to act constitutionally.

To illustrate, compare two Establishment Clause cases handed down by this Court on the same day: *Van Orden v. Perry,* 545 U.S. 677 (2005) (upholding government action placing Ten Commandments on Government property as Constitutional) and *McCreary County v. ACLU,* 545 U.S. 844 (2005) (striking down government action placing Ten Commandments on government property as unconstitutional). Four justices would have upheld both. Four justices would have struck down both. One justice upheld one and struck down the other – applying *Lemon*'s subjective standard, finding one symbolically endorsed religion and the other did not. *Compare*, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding a display of Jesus in a manger on public land as constitutional) and *Cnty. of Allegheny*, 492 U.S. at 573 (holding that a creche display on public property violated the Establishment Clause); *compare also Marsh*, 463 U.S. at 783 (holding a public expression of prayer constitutional) and *Santa*

Fe Indep. Sch. Dist., 530 U.S. at 290 (holding a public expression of prayer unconstitutional).

If this Court's Establishment Clause jurisprudence says the same practices are both constitutional and unconstitutional, then no predictability exists for those seeking to conform their conduct to the law. It also reveals the absurdity of the doctrine and the potential for its abuse by a politically motivated judge or activist lawyer. Predictability in the law is a necessary component of good governance under the Rule of Law. This Court's existing Establishment Clause jurisprudence replaces predictability in the law with the "evolving" political preferences of unelected judges.

5) The Appellate Court's Decision Fosters Unjustifiable Hostility Toward Religious Identity

Finally, this Court's judicially contrived Establishment Clause jurisprudence, relied upon by the appellate court, creates unjustifiable hostility toward the religious identity of numerous United States citizens. Many United States citizens seek guidance from their faith as part of their identity. Activist lawyers, government bureaucrats, and politically motivated judges repeatedly use this Court's Establishment Clause jurisprudence to denigrate a person's religious identity. They do so by requiring religious people to substitute a purpose informed by their religious conscience for one founded on secular beliefs or traditions.

Requiring, as the government did here, that every action have a secular purpose, and not even

symbolically endorse religion, is hostile toward a person's religious identity. It also attempts to make that identity culturally, socially, and politically irrelevant. Proponents of this secular approach favor it because it enables judges to nullify unalienable rights. Here they demand that only those with a secular belief system may motivate and inspire student athletes. Pet.App.5-6. Likewise, they assert that everyone can participate in important policy discussions except those whose identity is informed by religious viewpoints.

For example, in the State of Louisiana, Darwin's theory of evolution was taught in the government schools. Louisiana passed a law to also accommodate those with a different theory on the origin of the universe - creation science.[7] On its face, such an effort embodies the very essence of neutrality. The Court, however, reached an opposite conclusion in *Edwards v. Aguillard*, holding the law unconstitutional because it lacked a secular purpose and symbolically endorsed religious ideas. 482 U.S. 578, 583, 592 (1987). Thus, according to *Lemon's* revisionist test, and the appellate court below, to be constitutionally "neutral," all laws and other government action must have a secular purpose and not even symbolically endorse religion.[8]

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[7] The law prohibited the teaching of the theory of evolution in public schools unless accompanied by the instruction in creation science.

[8] *See also* G. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. Rev. 535, 566-572 (2004) (discussing how the neutrality principles demean religion in the United States).

Similarly, in *Epperson v. Arkansas*, the State of Arkansas passed a law regulating the teaching of evolution. 393 U.S. 97 (1968). The Court began its analysis by declaring that "[g]overnment in our democracy . . . must be neutral . . . ." *Id.* at 103. The Court nevertheless proceeded to hold that because the law was motivated by a religious purpose, it violated the Establishment Clause. Thus, although often couching its analysis in terms of neutrality, court decisions utilizing *Lemon's* progeny require secularly informed purposes while prohibiting religiously informed ones. Descriptive of such an analysis is Justice O'Connor's concurring opinion in *Wallace v. Jaffree*:

> It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws ... It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share.

472 U.S. at 75-76.

It is apparently acceptable, and sufficiently neutral though, for government to dictate and endorse a secular belief or practice that all citizens do not share – even though the secular perspective necessarily implies a rejection of religious significance. If another coach on another public-school field bowed the knee in a message of protest of civil authority, the government regime in this case would have done nothing to stop it.

The implications of decisions like *Aguillard* and *Epperson* are immense. Mandating the irrelevance of religious identity and God enables judicial extermination of our unalienable liberty as viewed by the Framers.

Too many judges and other government authorities rely on *Lemon* and its progeny to diminish religious identity and conscience. By way of example, senior citizens at a nursing home in Georgia were prohibited from praying before they ate their meal. The government said that because the meals were subsidized by the government, praying over the meal would be a violation of the Establishment Clause. Associated Press, Georgia Seniors Told They Can't Pray Before Meals, (May 10, 2010; updated Jan. 6, 2015), https://www.foxnews.com/us/prayers-answered-seniors-can-pray-before-meals-at-georgia-center (last visited Feb. 9, 2022).

Likewise, those whose actions are informed by the sacred rather than the secular have faced Establishment Clause challenges for: erecting the Ten Commandments, *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005); raising memorials for fallen heroes, *Am. Humanist Ass'n v. Maryland-Nat'l Cap. Park & Plan. Comm'n*, 874 F.3d 195, 201 (4th Cir. 2017), *rev'd and remanded sub nom. Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019), *Am. Atheists, Inc v. Duncan*, 616 F.3d 1145 (10th Cir. 2010); engaging in a moment of silence prior to starting school, *Wallace v. Jaffree,* 472 U.S. 38 (1985); praying prior to football games, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); and for

displaying a manger scene at Christmas time, *Cnty. of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573 (1989).

Several Justices have recognized how, contrary to the plain meaning of the Establishment Clause, *Lemon's* evolving judicially contrived jurisprudence creates unjustifiable hostility toward the religious identity of numerous United States citizens:

> Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage . . . . Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society [citation omitted]. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious . . . .
>
> When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

* * *

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion.

Cnty. of Allegheny, 492 U.S. at 657-59 (Kennedy, J., dissenting). These Justices correctly recognized that *Lemon's* "view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents." *Id.* at 655.

For those who view the world through their religious identity, God and his Word are real, and, therefore, really matter. *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015). It is part of who they are. They understandably oppose devolutionary social engineering that threatens the health, safety, and morals of the nation, as viewed through their religious identity. The government, envisioned by the appellate court and *Lemon's* progeny, must shape public policy informed by secular dogma, without regard to any religious conscience or moral considerations. In such a government, wisdom derived from religious tradition or individual conscience informed thereby has no place. Under our Constitution, people should not have to choose between fidelity to their religious identity or participating in First Amendment protected activity. *Lemon* and its progeny demand that they do so, invalidating any expression that is informed by their

religious identity. Thus, *Lemon*'s jurisprudential legacy deprives people of faith of their dignity by telling them that reliance on their faith while serving in government (here a government school) is unconstitutional.

In the larger picture, prohibiting a policy or practice, simply because it is informed by ancient sacred tenets, prevents thousands of years of wisdom from informing the public ethic. The idea that God created humans in His image, and that all human life has dignity, ended slavery and advanced the rights of women around the world.

We are, therefore, in the midst of a high-stakes battle over the character of the American nation. The extent to which *Lemon's* jurisprudence prevails over the plain meaning of the constitution will determine: 1) whether unalienable truth, as envisioned in the Declaration of Independence, will continue to be relevant as an objective limit on government action; and 2) whether the judiciary replaces the Framers' intent with its own personal social policy views.

Institutional integrity cannot exist without personal virtue. Good governance and civic institutional integrity rest on the virtue of those holding power within those institutions. Ideas grounded in one's religious identity support and nurture this virtue and should, therefore, always be permitted within the marketplace of ideas and the policymaking process. *Lemon,* and its progeny relied upon by the appellate court, precludes effective encouragement grounded in one's religious identity from inspiring the next generation. It also precludes great ideas grounded in one's religious identity from entering the policymaking

process. People of faith should not be stripped of their dignity, religious identity, and conscience in order to serve in our constitutional republic. That certainly was not the Framers' vision.

In summary, the appellate court's application of the endorsement test misconstrues the Establishment Clause in a manner which: 1) exceeds the scope of Article III, 2) bypasses constitutionally required processes for amending the constitution, 3) undercuts the legitimacy of judicial power, 4) creates substantial unpredictability in the law, and 5) fosters unjustifiable hostility toward the religious identity and dignity of numerous Americans. This Court should, therefore, overrule *Lemon* and no longer apply its evolving "no religious endorsement" progeny.

CONCLUSION

Because Mr. Kennedy's praying was not a law establishing a national religion, the praying did not violate the plain meaning of the Establishment Clause of the First Amendment. This Honorable Court should, therefore, reverse the decision of the appellate court.

If some see Mr. Kennedy praying as an endorsement of the values of patriotism, so be it. If some see it as an endorsement of sacrificial love, so be it. And if some see it, in part, as an endorsement of the greatest sacrifice of love that stands at the center of human history, so be it. It establishes no religion, and neither the Founders of this Nation nor the Framers of its Constitution would ever say that it did.

Respectfully submitted,

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February 25, 2022