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 *AMICI CURIAE* WORLD FAITH FOUNDATION AND INSTITUTE FOR FAITH AND FAMILY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae respectfully urge this Court to reverse the decision of the Ninth Circuit.

World Faith Foundation is a California non-profit, tax-exempt corporation established to preserve and defend the customs, beliefs, values, and practices of religious faith, as guaranteed by the First Amendment, through education, legal advocacy, and other means. WFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA).

Institute for Faith and Family ("IFF") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including religious liberty and parental rights. This Court's decision will help the State of North Carolina preserve its Opportunity Scholarship Program, which provides scholarships to low-income children throughout the state. See https://iffnc.com.

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[1] The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When National Day of Prayer legislation was introduced in 1952, a Senate report concluded that "[p]rayer has indeed been a vital force in the growth and development of this Nation," and thus an annual day of prayer would be an appropriate way of "reaffirming in a dramatic manner the deep religious conviction which has prevailed throughout the history of the United States." S. Rep. No. 82-1389. But Coach Kennedy's short, private prayer has triggered several years of intense litigation culminating on the steps of this Court, merely because his act of prayer might be *seen* by students. Bremerton School District seems obsessed with the fact that Kennedy may be observed by students when he prays. This near-paranoid view of the Constitution leaves students with a truncated view of American history that omits the Nation's rich religious heritage.

The complex intersection of public and private speech is nowhere more evident than in public education—the "marketplace of ideas"—where young minds are exposed to a wide range of subjects. The government is responsible for a considerable amount of speech, but the individuals involved in the system, including teachers, are also private citizens who enjoy First Amendment rights. In preparing young minds for citizenship, schools must provide an accurate and complete picture of American history, including the role of religion.

The Ninth Circuit pits the Establishment Clause against the Free Exercise Clause, creating unnecessary

tension. Prayer is not part of Kennedy's job duties. He prays as a private citizen, not as a government employee. That is abundantly clear to any reasonable observer.

ARGUMENT

I. COACH KENNEDY PRAYS AS AN *INDIVIDUAL* EXERCISING HIS *INDIVIDUAL* RIGHTS TO SPEECH AND FREE EXERCISE—NOT AS A GOVERNMENT EMPLOYEE SPEAKING FOR THE SCHOOL DISTRICT.

There would only be an Establishment Clause violation if Kennedy's prayer were *government* speech. But because the prayer is Kennedy's *private* speech as a citizen, outside the scope of his job duties, Bremerton may not suppress it. The School District's actions violate both the Free Speech and Free Exercise Clauses.

A. Government employees are citizens—not robots.

Even as an employer, *the government is still the government*, subject to constitutional constraints. Even as a government employee, *a citizen is still a citizen*. Government employees "do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). The Constitution does not permit a public employer to "leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.* at 419; see *Perry v. Sindermann*, 408 U.S. 593, 597 (1972);

Connick v. Myers, 461 U.S. 138, 147 (1983) ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government"). Neither students nor *teachers* "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). In *Meyer v. Nebraska*, 262 U.S. 390 (1923), this Court held that states may not forbid teaching a foreign language to young students because that would "unconstitutionally interfere with the liberty of *teacher*, student, and parent." *Tinker*, 393 U.S. at 506 (emphasis added).

The Ninth Circuit "obliterates such constitutional protections by announcing a new rule that *any* speech by a public school teacher or coach, while on the clock and in earshot of others, is subject to plenary control by the government." *Kennedy v. Bremerton Sch. Dist.* (*Kennedy IV*), 4 F.4th 910, 930 (9th Cir. 2021) (O'Scannlain, J., dissenting from denial of rehearing en banc). This rigid rule would muzzle Kennedy's First Amendment rights from "the moment [he] arrives at work until the very last of his players has gone home after a game." *Id.* The Ninth Circuit's ruling clearly conflicts with *Garcetti* and decades of this Court's precedent "affirming that the First Amendment *safeguards*—not banishes—private, voluntary religious activity by public employees." *Id.*

The doctrine of unconstitutional conditions further condemns the circuit ruling. "[A] State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in

freedom of expression." *Garcetti*, 547 U.S. at 413; *see Connick*, 461 U.S. at 142; *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Perry*, 408 U.S. at 597; *Branti v. Finkel*, 445 U.S. 507, 515-516 (1980). There was a time when "a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Garcetti*, 547 U.S. at 417, quoting *Connick*, 461 U.S. at 143. That theory has been "uniformly rejected." *Pickering*, 391 U.S. at 568; *Keyishian*, 385 U.S. at 605-606. As this Court confirmed in *Lane v. Franks*, "public employees do not renounce their citizenship when they accept employment, and . . . public employers may not condition employment on the relinquishment of constitutional rights." 573 U.S. 228, 236 (2014).

Pickering crafted a test with respect to a public employee's free speech rights that balances "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The government has "broader discretion" when acting in its role as employer, "but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Garcetti*, 547 U.S. at 418.

Perhaps, as Judge Ikuta suggests, this Court could develop "a parallel framework for evaluating how a public employer can protect its employee's religious expression without becoming vulnerable to an

Establishment Clause claim." *Kennedy IV*, 4 F.4th at 945 (Ikuta, J., dissenting from denial of rehearing en banc). In such a "parallel framework," the public employer's authority, during working hours and at its place of business, might resemble *the time-place-manner restrictions* that government may place on First Amendment speech rights. For example, religious expression woven into public-school curriculum during hours of compulsory attendance, mandating student participation, is far different than a coach's individual private prayer at the end of an extracurricular ballgame. The facts in Kennedy's case contrast sharply with a Third Circuit case involving "ceremonial student offerings to deities as part of a regularly scheduled course in the schools' educational programs." *Malnak v. Yogi*, 592 F.2d 197, 200 (3d Cir. 1979). The court properly found an Establishment Clause violation under these circumstances.

B. When a government employee exercises his liberty to pray, his words do not morph into state speech.

Bremerton's policy intentionally stifles *religious speech*, which is not only "as fully protected . . . as secular private expression," but historically, "government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 760 (1995) (collecting cases).

Speech classification is crucial in cases about religious expression. The First Amendment protects

private religious expression but restricts government speech. *Bd. of Ed. of Westside v. Mergens,* 496 U.S. 226, 250 (1990). *Private speech* is "the kind of activity engaged in by citizens who do not work for the government," such as "writing a letter to a local newspaper" or "discussing politics with a co-worker." *Garcetti*, 547 U.S. at 423. *Public speech* occurs where a public employee speaks in his or her capacity as a public employee and "there is no relevant analogue to speech by citizens who are not government employees." *Id*. at 424.

Kennedy prayed "at a time when it would have been permissible for him to engage briefly in other private conduct, say, calling home or making a reservation for dinner at a local restaurant." *Kennedy v. Bremerton Sch. Dist.* (*Kennedy II*), 139 S. Ct. 634, 635-636 (2019) (Alito, J., concurring). The Ninth Circuit rejected Justice Alito's examples, reasoning that "Kennedy's conduct violated the Establishment Clause, and obviously, checking a cell phone does not." *Kennedy v. Bremerton Sch. Dist.* (*Kennedy III*), 991 F.3d 1004, 1021 (9th Cir. 2021). This misses the point. A cell phone call to a spouse is not *religious* conduct, but it is clearly *private* speech. So is Kennedy's personal prayer "because there is a clear civilian analogue: Millions of Americans give thanks to God, a practice that has nothing to do with coaching a sport." *Kennedy IV*, 4 F.4th at 937 (O'Scannlain, J., dissenting from denial of rehearing en banc). If Kennedy were instructing his team on the field, that speech—unlike his prayer—would "owe[] its existence to a public employee's professional responsibilities." *Garcetti*, 547 U.S. at 421. The Ninth Circuit erroneously "lumps

together obvious examples of football coaching, calling plays and the like, with any speech that can be overheard by someone else, no matter how personal or private it may be." *Kennedy IV*, 4 F.4th at 934 (O'Scannlain, J., dissenting from denial of rehearing en banc).

The line between public and private speech may be fuzzy. "[W]hen public officials deliver public speeches . . . their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity." *Van Orden v. Perry,* 545 U.S. 677, 723 (2005) (Stevens, J., dissenting). Courts continue to wrestle with the interaction between the "government speech doctrine" and Establishment Clause principles. *Pleasant Grove City v. Summum*, 555 U.S. 460, 485-486 (2009) (Souter, J., concurring). But the Establishment Clause does not impose an absolute suppression on state and federal governments, which "have engaged in religious speech since the founding of the Republic"—established chaplaincies, military and prison chapels, the national motto and anthem, the Pledge, and religious proclamations—including National Day of Prayer, Memorial Day, and the "Year of the Bible" (1983). *American Jewish Congress v. City of Chicago,* 827 F.2d 120, 133 (7th Cir. 1987) (Easterbrook, J., dissenting). Proclamations for Thanksgiving Day and the National Day of Prayer "undoubtedly seem official" but "in most circumstances they will not constitute the sort of governmental endorsement of religion at which the separation of church and state is aimed." *Van Orden,* 545 U.S. at 723

(Stevens, J., dissenting). Such speech leaves Americans as free as they were before. Similarly, Kennedy's prayers leave the students, other faculty, and spectators free of even the slightest coercion.

C. Prayer is not within the scope of Kennedy's job duties as a football coach.

Under *Garcetti*, the "critical question" is whether Kennedy's prayer is "ordinarily within the scope of [his] duties." *Lane*, 573 U.S. at 240 (2014); *Kennedy III*, 991 F.3d at 1015. *Garcetti* held that "when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes." *Garcetti*, 547 U.S. at 421 (emphasis added). This applies to speech "the employer itself has commissioned or created." *Id*. at 422. The Ninth Circuit cited this portion of *Garcetti* yet reached the strange conclusion that "Kennedy spoke as a public employee, not as a private citizen." *Kennedy v. Bremerton Sch. Dist.* (*Kennedy I*), 869 F.3d 813, 822-823 (9th Cir. 2017). Prayer would logically be within the "official duties" of a ministerial employee serving a church or other religious organization, but not the "official duties" of a football coach. Bremerton did not "commission or create" Kennedy's prayers. The Ninth Circuit defies logic: "How can the panel hold that prayer was one of Kennedy's job duties when his employer maintained a policy banning it?" *Kennedy IV*, 4 F.4th at 937 (O'Scannlain, J., dissenting from denial of rehearing en banc). That is truly a "bizarre conclusion." *Id*. at 934.

The Ninth Circuit highlights Kennedy's obligation as a "role model" for students. *Kennedy I*, 869 F.3d at

826 ("modeling good behavior while acting in an official capacity in the presence of students and spectators"); *id.* ("role model and moral exemplar"); *id.* at 827 ("communicating the District's perspective on appropriate behavior through the example set by his own conduct"); *Kennedy III*, 991 F.3d at 1016 ("demonstrative communication as a role model for players"); *id.* at 1015 ("clothed with the mantle of one who imparts knowledge and wisdom," quoting *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994)).

The implications of the Ninth Circuit's first ruling are astounding. The opinion "can be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith." *Kennedy II*, 139 S. Ct. at 637 (Alito, J., concurring). It is indeed "remarkable" to suggest that any "outward manifestation of religious faith," "even while off duty" violates either the coach's employment duties or the Establishment Clause. *Id.* Perhaps even more remarkable is the Ninth Circuit's obsession with the fact that Kennedy could be seen by students, as if prayer were a shameful act to be hidden. "[B]y the opinion's sweeping logic, Kennedy's prayer—no matter how personal, private, brief, or quiet—was *wholly unprotected* by the First Amendment." *Kennedy IV*, 4 F.4th at 933 (O'Scannlain, J., dissenting from denial of rehearing en banc). This conclusion "runs afoul of controlling Supreme Court precedents on the Free Speech, Free Exercise, *and* Establishment Clauses." *Id.*

II. THE GOVERNMENT IS NOT REQUIRED TO BANISH RELIGION FROM PUBLIC LIFE GENERALLY OR PUBLIC EDUCATION SPECIFICALLY.

The wholesale exclusion of religious expression from public education is neither required nor even permitted by the Constitution. Students should be learning how the First Amendment protects a variety of diverse viewpoints, including religious beliefs and practices. Instead, the Ninth Circuit joins the School District's portrayal of Kennedy's short prayer as a shameful act to be shrouded in secrecy. Their position transgresses the government's obligation of benevolent neutrality toward religion.

The Religion Clauses together form a shield guarding religion from government intrusion. Compliance with the Establishment Clause does not justify discrimination that targets religion and banishes it from an entire sphere of public life. The Clause is not a sword to wield against religious expression in any public arena, even public education. "We recognize that . . . *throughout the course of the educational process*, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." *Lee v. Weisman,* 505 U.S. 577, 598-599 (1992) (emphasis added). Religion does not operate in a vacuum isolated from the rest of public life.

Recent years have brought attempts to squelch religious expression in the public square. One highly litigated example is public invocations—compelling no

one to do anything and briefly exposing listeners to religious content. These and similar efforts are contrary to both the First Amendment and America's religious heritage. Indeed, "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Salazar v. Buono*, 559 U.S. 700, 719 (2010), quoting *Lee*, 505 U.S. at 598. "[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring).

A. Public school students are entitled to a truthful presentation of American history, including its religious roots.

It would be a "a stilted overreaction contrary to our history and to our holdings" **t**o censor Kennedy's prayer merely because it occurred in a public-school context. *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984). Indeed, it would actively conceal America's history to prohibit all student exposure to public prayer—a tradition dating back to the nation's Founding.

"[P]rominent actions taken by the First Congress" reflect a philosophy of the Establishment Clause that makes room for the role of religion in American society. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019). These actions include "reenactment [of] the Northwest Territory Ordinance, which provided that '*[r]eligion*, morality, and knowledge, being necessary to good government and the happiness of mankind, *schools and the means of education* shall

forever be encouraged,' 1 Stat. 52, n. (*a*)." *Id*. (emphasis added).

The First Amendment guards the free exercise *of* religion—not a sweeping right to freedom *from* religion. Although the Establishment Clause protects against coercive government endorsement, "some references to religion in public life and government are the inevitable consequence of our Nation's origins." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring); *see also Pinette,* 515 U.S. at 780 (O'Connor, J., concurring). The Constitution would "betray its own principles" if it "guarantee[d] citizens a right entirely to avoid ideas with which they disagree." *Elk Grove*, 542 U.S. at 44 (O'Connor, J., concurring).

This principle remains true in public education. Undergraduate students prepare for the university, the quintessential "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972). The exclusion of all exposure to religion—including America's time-honored traditions of public prayer—would create a truncated view of the nation's history. Students must learn to endure speech that is offensive or even false as "part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee*, 505 U.S. at 590. Indeed, public school students attending required classes are exposed to "ideas they find distasteful or immoral or absurd or all of these." *Id*. at 591.

B. Respect for the religious practices of others is a fundamental civic virtue that public schools can and should cultivate.

Public education plays a critical role in preparing young minds to exercise their own constitutional rights and respect the rights of others. As students learn how to implement First Amendment principles, "maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate." *Lee,* 505 U.S. at 638 (Scalia, J., dissenting). Indeed, an absolute ban on references to religion misrepresents American history, truncates the education provided to students, and "corrodes the civic virtues that *underlie* the First Amendment." *Kennedy IV*, 4 F.4th at 936 (O'Scannlain, J., dissenting from denial of rehearing en banc). Confining private prayer "to an empty office, or perhaps to the teacher's lounge, is an insult to the First Amendment, which 'extends to private *as well as public* expression.'" *Id.*, quoting *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 n.4 (1979) (emphasis added).

Teachers are asked "to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens . . . . They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them." *Kennedy IV*, 4 F.4th at 936 (O'Scannlain, J., dissenting from denial of rehearing en banc), quoting *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring). Public schools have a role in "educat[ing] youth in the values of a democratic, pluralistic society."

Coles ex rel. Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 378 (6th Cir. 1999); *id*. at 377 ("public schools are particularly important to the maintenance of a democratic, pluralistic society"). Rigorous protection of constitutional liberties is essential to preparing young persons for citizenship, so that we do not "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

One of the earliest public-school cases rejected an Establishment Clause challenge to a program allowing students to be released for off-campus religious exercises, explaining that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson,* 343 U.S. 306, 313 (1952). Even—or perhaps especially—in public education, courts must balance the government's obligation to neither "press religious observances upon [its] [students] . . . nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage." *Van Orden,* 545 U.S. at 683-684. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). That "community" includes both students and faculty. Kennedy's prayer briefly exposes students to religion but compels no one to do anything.

The First Amendment facilitates the free flow of information and ideas. "The Nation's future depends upon leaders trained through wide exposure" to a "robust exchange of ideas" that "discovers truth out of

a multitude of tongues" rather than "authoritative selection." *Keyishian*, 385 U.S. at 603. The government may not "contract the spectrum of available knowledge." *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 866 (1982), quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). This is particularly true in education, where students are exposed to a broad range of subjects. Public schools are not "enclaves of totalitarianism" and "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Pico*, 457 U.S. at 877 (Blackmun, J., concurring), quoting *Tinker*, 393 U.S. at 511. Bremerton's approach offends both Religion Clauses by creating an educational vacuum that effectively "establishes" atheism by default, as if America's religious history did not exist. Such exclusion "would require that we ignore much of our own history and that of the world in general." *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 971 (9th Cir. 2011). Moreover, "[h]igh school students are mature enough . . . to understand that a school does not endorse or support student [or other] speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250 (1990).

Even one of the Ninth Circuit judges admitted that schools should "teach [students] about the first amendment, about the difference between private and public action, [and] about why we tolerate divergent views." *Kennedy I*, 869 F.3d at 837 n. 5 (Smith, J., concurring). Schools can best accomplish that task by declining to censor the private religious speech of a teacher.

C. Coercion is required for an Establishment Clause violation.

This case demonstrates the very opposite of coercion. Kennedy "made sure players knew that they did not need to join in." *Kennedy IV*, 4 F.4th at 948 (Nelson, J., dissenting from denial of rehearing en banc). When student players asked to join him, Kennedy answered:

> "This is a free country[.] . . . You can do what you want."

Id., quoting *Kennedy III*, 991 F.3d at 1010; *see also Kennedy I*, 869 F.3d at 816.

The Constitution does not "impose a prohibition on all religious activity in our public schools." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (collecting cases). It is only "when the State affirmatively sponsors the particular religious practice of prayer" that "the religious liberty protected by the Constitution is abridged." *Id*. A constitutional violation requires "that the government itself has advanced religion through its own activities and influence." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987). This Court has "proscribed government-sponsored prayer in public schools" because the "risk of coercion on students" is at its zenith in that environment. *Am. Legion*, 139 S. Ct. at 2093 (Kavanaugh, J., concurring). Here, there is nothing "official" and no hint of coercion. Bremerton has neither "affirmatively sponsor[ed]" Kennedy's prayers nor coerced anyone to participate.

The "hallmark of historical establishments . . . was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Van Orden,* 545 U.S. at 693 (Thomas, J., concurring), citing *Lee v. Weisman,* 505 U.S. at 640 (Scalia, J., dissenting); *see also Am. Legion*, 139 S. Ct. at 2095-2096 (Thomas, J., concurring). Kennedy's prayer "bears no resemblance to the kinds of institutional entanglements with religion" likely to trigger an Establishment Clause violation. *Kennedy IV*, 4 F.4th at 940 (O'Scannlain, J., dissenting from denial of rehearing en banc).

Earlier cases in this Court demonstrate the nature of coercion. The New York school district in *Engel v. Vitale* required students to "recite a prescribed non-denominational prayer at the beginning of each school day." 370 U.S. 421, 436 (1962). This Court explained 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 government." *Id*. at 425. Similarly, in *Sch. Dist. of Abington Twp., Pa. v. Schempp*, the state "required a religious exercise" in public schools. 374 U.S. 203, 225-26 (1963). These cases hinge on "whether a school's practices coerce students into religious practices or beliefs" by "sponsor[ing] religion or leverage[ing] mandatory attendance requirements." *Kennedy IV*, 4 F.4th at 947-948 (Nelson, J., dissenting from denial of rehearing en banc). Here, the School District admitted there was "no evidence" that students were "directly coerced to pray with Kennedy." *Kennedy I*, 869 F.3d at 820.

The Ninth Circuit attempted to find "coercion" because one student "feared he would get less playing time if he did not participate" in Kennedy's prayers. *Kennedy IV*, 991 F.3d at 2021 (Christen, J., concurring in denial of rehearing en banc). But even this "subtle coercive pressure," similar to the graduation ceremony in *Lee* (505 U.S. at 592) is hardly equivalent to the legal coercion in *Engel v. Vitale, Sch. Dist. of Abington Twp.,* or in *Barnette*, where students were required by law to recite the Pledge of Allegiance or face draconian penalties such as expulsion or the prosecution of their parents for causing delinquency. *Barnette*, 319 U.S. at 629-630.

D. Student observation of prayer is not tantamount to coercion.

Even without coercion, the School District and the Ninth Circuit are apoplectic over the possibility that Kennedy might be seen by students when he prays, as if prayer were a shameful act to be hidden in darkness. Kennedy was informed that his prayer must be "physically separate from student activity," "in a private location," not "outwardly discernible as religious activity" (kneeling or speaking aloud), not "readily observable" by students or the public. *Kennedy IV*, 4 F.4th at 931-932 (9th Cir. 2021) (O'Scannlain, J., dissenting from denial of rehearing en banc); *Kennedy III*, 991 F.3d at 1011-13.

Nothing could be more offensive to American history and practice than these sweeping pronouncements. Such an interpretation would condemn even teachers who, "within the eyesight of students," are observed "folding their hands or bowing their heads" to give

thanks before a meal. *Kennedy II*, 139 S. Ct. at 636 (Alito, J., concurring). One concurring Ninth Circuit judge acknowledged there is no case law holding that "a high school teacher must be out of sight of students or jump into the nearest broom closet" to say a private prayer, and an on-duty teacher who briefly prays before her meal "would not risk sending a message that [the School District] endorses her faith." *Kennedy III*, 991 F.3d at 1052 (Christen, J., concurring). But in the same breath, "this football coach's prayer at the fifty-yard line, immediately after a game, under stadium lights and in front of players and spectators, objectively sent a public message." *Id*. The court scrambles its own message.

The Ninth Circuit veers away from "the constitutional right Kennedy *actually asserted*—and the District *actually denied*." *Kennedy IV*, 4 F.4th at 930 (O'Scannlain, J., dissenting from denial of rehearing en banc). That right is stated up front in the first of two questions presented to this Court:

> 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.

Rather than "attempting to pinpoint" the constitutionally relevant facts, "the Ninth Circuit recounted all of petitioner's prayer-related activities over the course of several years." *Kennedy II*, 139 S. Ct. at 636 (Alito, J., concurring). *See, e.g., Kennedy I*, 869 F.3d at 825 ("the relevant 'speech at issue' involves kneeling and praying on the fifty-yard line

immediately after games *while in view of students and parents*"); *Kennedy III*, 991 F.3d at 1015 ("Kennedy insisted that his speech occur while players stood next to him, fans watched from the stands, and he stood at the center of the football field."). The court denied that its first opinion suggested "a teacher bowing her head in silent prayer before a meal in the school cafeteria would constitute speech as a government employee" (*id.* 1015) but offered no credible rationale to distinguish that prayer from Kennedy's practice, other than his mere visibility to students and the publicity generated during the course of litigation.

One judge went so far as to pronounce a *theological* judgment that Kennedy's "staged public prayers . . . clearly flout the instructions found in the Sermon on the Mount on the appropriate way to pray." *Kennedy IV*, 4 F.4th at 926 (Smith, J., concurring in denial of rehearing en banc). This remark smacks of hostility and defies the benevolent neutrality required of government.

III. THE NINTH CIRCUIT PITS THE ESTABLISHMENT CLAUSE AGAINST THE FREE EXERCISE CLAUSE, CREATING TENSION WHERE NONE EXISTS.

The line between religion and government tends to be "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurzman*, 403 U.S. 602, 614 (1974); *Zorach,* 343 U.S. at 312. Drawing that line is a particularly thorny task where a single individual is both a government representative and a private citizen. But the difficulties should not be exaggerated.

American history is replete with official acknowledgements of religion and even proclamations calling on citizens to pray.

The Ninth Circuit fails to "distinguish between real threat and mere shadow." *Am. Legion*, 139 S. Ct. at 2091 (Breyer, J., concurring); *Van Orden*, 545 U. S. at 704 (Breyer, J., opinion concurring in judgment) (quoting *School Dist. of Abington Township* v. *Schempp*, 374 U. S. at 308 (Goldberg, J., concurring)). It "leaps beyond the Establishment Clause's original meaning to the detriment of free exercise rights." *Kennedy IV*, 4 F.4th at 949 (Nelson, J., dissenting from denial of rehearing en banc).

Both Religion Clauses "secure religious liberty." *Engel v. Vitale,* 370 U.S. at 430. The Establishment Clause was not designed to "*purge religion from the public square*." *Kennedy IV*, 4 F.4th at 953 (Nelson, J., dissenting from denial of rehearing en banc) (emphasis added). "Historical practice shows that allowing religion in the public square was never understood to be an establishment." *Id.* at 950; *see* 3 Joseph Story, Commentaries on the Constitution of the United States § 405 (1833). This Court must preserve benevolent neutrality, avoid "callous indifference" (*Zorach*, 343 U.S. at 314), and ensure the Establishment Clause is not used as a destructive force against religion.

A. The Establishment Clause does not justify a government employer's denial of an employee's First Amendment freedoms.

The Ninth Circuit makes the "indefensible" assumption that "*allowing* Kennedy to pray[] on the fifty-yard line immediately following the game in full view of students and spectators *would* constitute an Establishment Clause violation." *Kennedy IV*, 4 F.4th at 954 (Collins, J., dissenting from denial of rehearing en banc), citing *Kennedy III*, 991 F.3d at 1022 (emphasis added) (cleaned up). The School District, in defense of its suppression of Kennedy's speech and free exercise rights, alleges it has a "compelling state interest to avoid violating the Establishment Clause." *Id*. at 1020. That interest allegedly "trumps [a teacher's] right to free speech." *Id.* at 1016-17, quoting *Peloza*, 37 F.3d at 522. This rationale is claimed to be "adequate justification for treating [Kennedy] differently from any other member of the public." *Lane*, 573 U.S. at 242, quoting *Garcetti*, 547 U.S. at 418. The Ninth Circuit supports its reasoning by citing two cases in which this Court *rejected* a school's Establishment Clause defense, even under the much-criticized *Lemon* test: *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001) ("we conclude the school has no valid Establishment Clause interest"); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) ("we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech").

The Ninth Circuit's contention "that the Constitution not only permitted, but *required*, the District to punish Kennedy's private prayer . . . subverts the entire thrust of the Establishment Clause, transforming a *shield* for individual religious liberty into a *sword* for governments to *defeat* individuals' claims to Free Exercise." *Kennedy IV*, 4 F.4th at 938 (O'Scannlain, J., dissenting from denial of rehearing en banc). This turns the First Amendment upside down.

B. The First Amendment guarantees heightened protection for *religion*, not "irreligion."

The Ninth Circuit falls prey to the mistaken notion that the Establishment Clause mandates not only government neutrality between one religion and another, but also "between religion and nonreligion." *Kennedy III*, 991 F.3d at 1017, citing *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). The First Amendment rejects this counterfeit "neutrality"—it respects all views but grants heightened protection for *religion*.

The Religion Clauses were "written by the descendants of people who had come to this land precisely so that they could practice their religion freely." *McCreary,* 545 U.S. at 881. Both Clauses were designed to prevent an established national church like the Church of England, controlled and funded by government, and to prohibit governmental preference for any one Christian sect. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815). In the "crucible of litigation," modern courts have acknowledged "the right to select

any religious faith or none at all." *Wallace v. Jaffree,* 472 U.S. 38, 52-53 (1985). But this Court has distanced itself from placing "irreligion" on a par with religion. "Despite Justice Stevens' recitation of occasional language to the contrary . . . we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion." *Van Orden,* 545 U.S. at 684 n. 3. Justice Scalia's *McCreary* dissent foreshadows this pronouncement. "With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that 'the First Amendment mandates governmental neutrality between . . . religion and nonreligion . . . . ' Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words." *McCreary,* 545 U.S. at 889 (Scalia, J., dissenting) (citing majority opinion, *id.* at 875-876).

C. This case lacks the *state* action required for an Establishment Clause violation.

Kennedy's private religious speech is not state action and consequently does not transgress the Establishment Clause, "which announces a constraint on the *State*, rather than non-state actors." *Kennedy IV*, 4 F.4th at 940 (O'Scannlain, J., dissenting from denial of rehearing en banc). "[T]he First Amendment *constrains governmental actors* and *protects private actors*." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (emphasis added). Bremerton "backed itself into the corner" by admitting that the District targeted Kennedy's prayer "*because* the

conduct is religious." *Kennedy IV*, 4 F.4th at 939 (O'Scannlain, J., dissenting from denial of rehearing en banc), quoting *Kennedy III*, 991 F.3d at 1020 (emphasis in original). Such intentional targeting is the epitome of a Free Exercise violation.

Decades ago, this Court described the Establishment Clause as "forestal[ling] compulsion by law of the acceptance of any creed or the practice of any form of worship." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Nothing in this case remotely fits this description. Kennedy's prayer, like other private religious speech on public school property, "does not constitute state action" and therefore does not violate the Establishment Clause. *Kennedy IV*, 4 F.4th at 940 (O'Scannlain, J., dissenting from denial of rehearing en banc) (collecting cases).

D. No *reasonable* observer would attribute Kennedy's prayer to the School District.

The School District reverted to an "objective observer" analysis "because someone *might* mistakenly attribute Kennedy's prayer to the District." *Kennedy IV*, 4 F.4th at 941 (O'Scannlain, J., dissenting from denial of rehearing en banc). The Ninth Circuit reasoned that "an objective student observer" would see Kennedy "perform a distinctively Christian religious act on a secured portion of school property while supervising students"—"something no ordinary citizen could do." *Kennedy I*, 869 F.3d at 836 (Smith, J., specially concurring). After this Court remanded the case, the Ninth Circuit doubled down and manufactured a "mandate" to silence Kennedy, based on the possible misperception of endorsement. *See*

Kennedy III, 991 F.3d at 1016-19; *Kennedy IV*, 4 F.4th at 929 (Christen, J., concurring in denial of rehearing en banc) ("Had BSD abandoned its opposition to Coach Kennedy's on-field prayers after his multiple interviews with local and national media, an objective observer would have perceived that BSD endorsed his speech.")

The School District relied heavily on *Santa Fe* in applying the "objective observer" test to Kennedy's "pugilistic efforts to generate publicity in order to gain approval of [his] on-field religious activities." *Kennedy III*, 991 F.3d at 1017. This test stems from the purpose and effect prongs of the now-discredited *Lemon* test, "an ahistorical, atextual, and failed attempt to define Establishment Clause violations." *Kennedy IV*, 4 F.4th at 945 (Nelson, J., dissenting from denial of rehearing en banc). *Santa Fe* was built on the flawed *Lemon* foundation. 530 U.S. at 319 (Rehnquist, C.J., dissenting) (the majority relied on "the most rigid version of the oft-criticized test of *Lemon*" which "has had a checkered career in the decisional law of this Court.") But this Court "no longer applies the old test articulated in *Lemon*." *Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring). It seems the multitude of exceptions have finally swallowed the *Lemon* rule. A majority of this Court's Justices have "personally driven pencils through the creature's heart." *Kennedy IV*, 4 F.4th at 946-947 (Nelson, J., dissenting from denial of rehearing en banc), quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

Only a flight from reason would justify attributing Kennedy's prayer to the School District. The District had zero involvement in the prayers apart from its efforts at suppression. Only by ignoring that censorship could anyone think (though mistakenly) that the District endorsed Kennedy's speech. "But the mere possibility of such a mistake does not turn private speech into endorsement." *Kennedy IV*, 4 F.4th at 942 (O'Scannlain, J., dissenting from denial of rehearing en banc). "There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion." *Pinette,* 515 U.S. at 780. Justice O'Connor, the architect of the "endorsement" test, quoted this passage and added that "[n]early any government action could be overturned as a violation of the Establishment Clause if a heckler's veto sufficed to show that its message was one of endorsement." *Elk Grove*, 542 U.S. at 35 (O'Connor, J., concurring). The endorsement test is qualified: The "reasonable observer" evaluates endorsement through the lens of "history and ubiquity." *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989) (O'Connor, concurring).

Any person aware of America's religious heritage generally (Sect. IV) or in public education specifically (Sect. II) would understand that Kennedy prayed solely as a private citizen exercising his First Amendment rights. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Kennedy IV*, 4 F.4th at 941 (O'Scannlain, J., dissenting from denial of rehearing en banc), quoting *Mergens*, 496 U.S. at 250 (plurality op.). Even a "modern-day observer—infused with today's more recent

separationist mentality" (*Kennedy IV*, 4 F.4th at 953 (Nelson, J., dissenting from denial of rehearing en banc)) has no basis to characterize Kennedy's obviously private prayer as government speech. Unlike *Santa Fe*, the prayer is not connected to an official school policy or broadcast as part of a school event. Cf. *Santa Fe*, 530 U.S. at 307 ("delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property").

The "offended observer" theory is even further off base constitutionally. There is no parent or student alleging "the government coerced his or her participation in a state-sponsored prayer service." *Kennedy IV*, 4 F.4th at 930 (O'Scannlain, J., dissenting from denial of rehearing en banc). As Justice Gorsuch emphasized in *Am. Legion*, this "theory of standing has no basis in law," as it fails to articulate a "concrete and particularized" injury. 139 S. Ct. at 2098 (Gorsuch, J., concurring). "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Id.*, quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

IV. COACH KENNEDY'S RIGHT TO PRAY MUST BE AFFIRMED WHEN CONSIDERED AGAINST THE BACKDROP OF AMERICAN HISTORY.

Religion is woven into the fabric of American law, history, and life—both public and private. American government is inescapably linked to religion: "Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Letter (Oct. 11, 1798), reprinted in 9 Works

of John Adams 229 (C. Adams ed. 1971). History abounds with examples of public prayer:

- When George Washington swore his oath of office on a Bible and gave his inaugural address, he said: "It would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe . . . ." Inaugural Addresses of the Presidents of the United States, S. Doc. 101-10, p. 2 (1989).

- Both Houses of Congress passed resolutions in 1789 asking President George Washington to issue a Thanksgiving Day Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer. . . ." 1 Annals of Cong. 90, 914 (internal quotation marks omitted). *Van Orden v. Perry,* 545 U.S. at 686; *see also* Presidential Proclamation, 1 Messages and Papers of the Presidents, 1789-1897, p. 64 (J. Richardson ed. 1897). This tradition of Thanksgiving Proclamations—with their religious theme of prayerful gratitude to God—has been adhered to by almost every President.

- President Lincoln designated April 30, 1863, as a National Day of Prayer and Humiliation. *See McCreary County,* 545 U.S. at 910 n. 13 (Scalia, J., dissenting).

- In 1998, Congress designated the last Monday in May as Memorial Day, requesting a Presidential Proclamation "calling on the people of the

> United States to observe [the day] by praying, according to their individual religious faith, for permanent peace." 36 U.S.C. § 116(b)(1).

American history is "replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers." *Lynch,* 465 U.S. at 675. The legislative prayer upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983) was rooted "in the events of the first week of the First Session of the First Congress in 1789," when Congress provided for paid Chaplains in both houses. *Lynch*, 465 U.S. at 674. "It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers." *Id*. All three branches of government consistently acknowledge the role of religion in America. *Id*. Various official pronouncements, including Christmas and Thanksgiving holidays, have been expressed in religious terms (*id*. at 676), and "[t]here are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage . . . ." *Id*. at 677. Such acknowledgment "follows the best of our traditions" and "respects the religious nature of our people." *Zorach,* 343 U.S. at 314.

The Ninth Circuit discounts all this history and its opinion "bristles with hostility to all things religious in public life." *Santa Fe*, 530 U.S. at 318 (Rehnquist, C.J., dissenting). Historically, religion is closely linked to public education. "In our nation's early days, clergy oversaw education and often intermixed religious training." *Kennedy IV*, 4 F.4th at 950 (Nelson, J.,

dissenting from denial of rehearing en banc), citing Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J. L. & Pub. Pol'y 657, 663 (1998); *see also* Alexis de Tocqueville, 1 Democracy in America 314 n.f (2d ed. 1900) ("Almost all education is entrusted to the clergy.").

In view of this extensive historical background, it is no wonder this Court has returned to a historical test to interpret the Establishment Clause. Although "prayer is by definition religious" (*Am. Legion*, 139 S. Ct. at 2087), this Court discarded *Lemon* in favor of a historical approach to legislative prayer in *Marsh v. Chambers* and *Town of Greece v. Galloway*, 572 U.S. 565 (2014). The plurality in *Van Orden* analyzed a monument in view of "our Nation's history." *Van Orden*, 545 U.S. at 686. "This history-based test is not *a* way to approach Establishment Clause cases, *see Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring)—it should be *the* way." *Kennedy IV*, 4 F.4th at 950 (Nelson, J., dissenting from denial of rehearing en banc). There is ample support for a history-based test in the context of public education, but "[t]he [Ninth Circuit] panel missed that cue" and instead applied "an ahistorical and expansive view of the Establishment Clause." *Id.* at 946. The "unmistakable" message of *Am. Legion* is that "*Town of Greece*, not *Lemon*" is the appropriate test—not because of the antiquity of a practice but rather "its compliance with ageless principles." 139 S. Ct. at 2102 (Gorsuch, J., concurring).

The right to individual, private prayer complies with "ageless principles." America's Founders

recognized religion as both a human right and "a *duty* towards the Creator." *Wallace v. Jaffree,* 472 U.S. at 54 n. 38, citing James Madison's "Memorial and Remonstrance Against Religious Assessments" (emphasis added). If these rights are severed from their roots, they will wither and die. They will no longer be inalienable but will hang by the thread of human whim. No one will be free—not even those who demand a rigid "separation of church and state."

CONCLUSION

This court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

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