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* THE CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
CONSTITUTIONAL COUNSEL GROUP
174 W. Lincoln Ave., #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

Rules

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that Religion Clauses forbid official hostility toward religion. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Carson v. Makin*, No. 20-1088; *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020); *Espinoza v. Montana Dept. of Revenue*, 140 S.Ct. 2246 (2020); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049 (2020); *American Legion v. American Humanist Ass'n*, 139 S.Ct. 2067 (2019); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Arlene's Flowers v. Washington*, 138 S.Ct. 2671 (2018); and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

SUMMARY OF ARGUMENT

The Ninth Circuit ruled that a public school was *required* by the Establishment Clause to punish a teacher who engaged in silent prayer in view of students. According to the lower court, if an objective observer could believe that the teacher's silent prayer

---

[1] All parties filed blanket consents to the filing of amicus briefs in this case. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

was approved by the school, the school is then required to punish the teacher and prohibit the silent prayer. In effect, the lower court and respondents convert activity *protected* by the Free Exercise Clause into a category of "offensive speech" that government is *obliged* to purge lest an unknowing observer have his feelings hurt.

As Justice Gorsuch and others have pointed out, this "offended observer" standard simply has no place in an Establishment Clause jurisprudence that is based on the original understanding of the Constitution. *American Legion v. American Humanist Ass'n*, 139 S.Ct. at 2098 (Gorsuch, J., concurring in the judgment). The Establishment Clause neither authorizes nor permits states to discriminate against religious speech by public employees.

The Establishment Clause was meant as a federalism protection for states against the possibility that the new federal government would create an Establishment overriding state preferences. Even if there were an individual right within the Establishment Clause, it is a right against actual coercion, not presumed offense at religious activity by individuals.

The Free Exercise Clause, by contrast, specifically protects against government hostility and discrimination against the exercise of the individual right of religion, regardless of who might be offended. Once incorporated against the states, the Free Exercise Clause prohibited official state policies of hostility toward religion, such as the school district's decision to fire petitioner in this case. The Constitution does not sanction discrimination against religious thought, belief, or practice. Instead, religious exercise is expressly protected. The school district's claim that they

were compelled by the Establishment Clause to engage in such discrimination must be rejected. The Court should use this case to disavow any notion that the Establishment Clause permits state (or federal) discrimination against the exercise of religion.

ARGUMENT

I. The Establishment Clause Neither Compels nor Permits Discrimination Against Religious Exercise by Public Employees.

This Court has already rejected the idea that the Establishment Clause created a "compelling interest in maintaining strict separation of church and state" that justified content and viewpoint-based regulation of speech. *Rosenberger v. Rectors & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). Far from authorizing (or compelling) content or viewpoint-based regulation of religious speech, our nation's history and practice shows that religious activity was meant to be fostered and protected. Since the founding of this nation, Congress has confirmed that "[r]eligion, morality, and knowledge" are necessary for good government rather than antithetical to it. *Id.* at 862 (Thomas, J., concurring) (quoting Northwest Ordinance, Art. III (1787)). The Establishment Clause was never intended to require government hostility toward religion, nor was it intended to protect "offended observers." Instead, its purpose was to protect states against federal interference and to protect against coercion.

A. The Establishment Clause was intended as a federalism protection for the states.

As Justice Scalia noted, "our Constitution cannot possibly rest upon the changeable philosophical predilections of the justices of this Court but must have deep foundations in the historic practices of our people." *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting). Much of this Court's Religion Clause jurisprudence, however, was constructed on an edifice of mistaken understanding of the history of that Clause. A close look at the history demonstrates that the Establishment Clause was meant as a federalism protection for the states rather than as an individual right. *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring). If it does protect an individual right, it is a right against coercion, not a protection against a "personal sense of affront." *See Town of Greece v. Galloway*, 572 U.S. 565, 589 (plurality opinion), 608 (Thomas, J. concurring) (2014). A government program that does not create or support a coercive establishment does not implicate the freedom enshrined in the Establishment Clause. *Van Orden v. Perry*, 545 U.S. 677, 693-94 (2005) (Thomas, J. concurring). The school district was not involved in petitioner's private prayer, and no one was coerced into participating. Indeed, there was no government action at all. By its terms, the Establishment Clause prohibits a "law respecting the establishment of religion." U.S. Const., Amend I. As is the case for statues and memorials, private silent prayer by public employees is obviously not a law. *See American Legion*, 139 S.Ct. at 2095 (Thomas, J., concurring in the judgment).

In colonial America, state establishments of religion were ubiquitous. While the Puritans ruled New England to advance their vision of a Christian commonwealth, the Church of England held the allegiances of colonies like Virginia and Georgia. Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1422-23 (1990) [hereinafter McConnell, *Origins of Free Exercise*]. New York and New Jersey welcomed those that did not fit into the Puritan or Anglican tradition. *Id.* Pennsylvania and Delaware were founded as safe havens for Quakers, while Maryland was founded as a refuge for English Catholics who suffered persecution in Britain. *Id.* Most notably, Roger Williams founded Rhode Island as a colony for Protestant dissenters after the General Court banished him from Massachusetts. *Id.*

This variety of religious establishments allowed colonists to settle in a place that most accommodated their own religious preferences. Even as disestablishment took hold after the Revolution, states viewed religious belief and practice as essential to a civil society. See Mass. Const. of 1780, pt. 1, art. III ("[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality..."); Petition for General Assessment (Nov. 4, 1784), reprinted in C. James, Documentary History of the Struggle for Religious Liberty in Virginia 125, 125 (1900 and photo. reprint 1971) ("[B]eing thoroughly convinced that the prosperity and happiness of this country essentially depends upon the progress of religion..."); G. Washington, Farewell Address (Sept. 17, 1796), reprinted in 1 Documents of American History 169, 173 (H. Commager 9th ed. 1973) ("[O]f all the dispositions and

habits that lead to political prosperity, religion and morality are indispensible supports...").

This history of varied establishments and trend of disestablishment provided the impetus for the Religion Clauses. Antifederalists were alarmed at the Constitution's failure to secure the individual rights of Americans and were concerned that the federal government would have the power to declare a national religion, thus squelching the practices of religious minorities. *See* Letters from the Federal Farmer (IV) (Oct. 12, 1787), reprinted in 2 The Complete Anti-Federalist 245, 249 (Herbert J. Storing ed., 1981); *see also* Essay by Samuel, Indep. Chron. & Universal Advertiser (Boston), Jan. 10, 1788, reprinted in 4 The Complete Anti-Federalist, *supra*, at 191, 195. Though not hostile to state establishments, the antifederalists were concerned that a federal government might "[M]ake every body worship God in a certain way, whether the people thought it right or no, and punish them severely, if they would not." Letters from a Countryman (V), N.Y, J., (Jan. 17, 1788), reprinted in 6 The Complete Anti-Federalist, *supra*, 86, 87. As one antifederalist noted regarding the differences between different states, "It is plain, therefore, that we [Massachusetts citizens] require for our regulation laws, which will not suit the circumstances of our southern brethren, and the laws made for them would not apply to us." Letters of Agrippa (XII), Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, *supra*, 93, 94.

Acting upon these concerns, at least four states submitted amendments concerning religious liberty along with their official notice of ratification of the Constitution. *See* Declaration of Rights and Other

Amendments, North Carolina Ratifying Convention (Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter The Founders Constitution] ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion, according the dictates of his conscience"); New Hampshire Ratification of the Constitution (June 21, 1788), reprinted in 1 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 325, 326 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) ("Congress shall make no laws touching religion, or to infringe the rights of conscience"); New York Ratification of Constitution (July 26, 1788), reprinted in The Founders' Constitution, *supra* 11-12 ("That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."); Proposed Amendments to the Constitution, Virginia Ratifying Convention (June 27, 1788), reprinted in The Founders' Constitution, supra 15-16 ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion").

With these demands from various states in mind, the First Congress set to work to fashion an amendment that would appease these concerns. McConnell, *Origins of Free Exercise*, *supra*, at 1476-77. After debate over the exact wording of the Religion Clause in the House and the Senate, both houses agreed to the final conference committee report. 1 Annals of Cong. 88 (Joseph Gales ed., 1789). From this committee

emerged the Religion Clauses as they are known today: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I.

States that had establishments feared federal interference. Letters of Agrippa (XII), Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, supra, 93, 94. That fear was also shared by states that had no establishment. Because of the Supremacy Clause, states were concerned that Congress might impose a federal establishment that would overrule individual state rules. Thus, the First Amendment's "no law respecting an establishment of religion" provision had a clear federalism purpose. Therefore, incorporation of this provision against the states must be understood as protecting state authority to the maximum extent possible consistent with individual liberty lest it be interpreted to require the very thing that it forbids, federal interference with state support of religion. *Zelman*, 536 U.S. at 678, 679 (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. at 50 (Thomas, J., concurring). The individual liberty protected by the clause is freedom from government coercion of individual religious observance or interference with the form of religious worship. It does not mandate government prohibition of or interference with religious expression.

The prohibition on any law "respecting an establishment of religion" was never meant to be a prohibition on public acknowledgement of religion. It was instead a ban on federal government coercion and federal intrusion on state authority. This distinction is

clear from the rich history of religious acknowledgments and exercises by all three branches of government after adoption of the First Amendment.

B. If it includes an individual right, the Establishment Clause protects against coercion of individuals and religious institutions.

As noted above, the Congress that proposed the First Amendment and the states that ratified it had significant experience with the concept of religious establishments. Some establishments involved governmental coercion that compelled a form of religious observance. Thus, some states sought to control the doctrines and structure of the church. South Carolina did this through its 1778 Constitution requiring a church to ascribe to five articles of faith before being incorporated as a state church. S.C. Const. of 1778 art. XXXVIII, reprinted in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1626 (Ben Perley Poore ed., The Lawbook Exch. Ltd. 2d ed. 2001) (1878). Other states, like Virginia, sought to control the personnel of the church and vested the power of appointing ministers of the Anglican Church in local governing bodies known as vestries. Rhys Isaac, *Religion and Authority: Problems of the Anglican Establishment in Virginia in the Era of the Great Awakening and the Parsons' Cause*, 30 Wm. & Mary Q. 3 (1973).

The other type of government coercion at play in religious establishments involved coercion of the individual in his or her religious practice. Massachusetts, for instance, prosecuted Baptists who refused to baptize their children or attend Congregationalist ser-

vices. Michael McConnell, *Establishment & Dis-establishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev 2105, 2145 (2003) [hereinafter McConnell, *Establishment & Dis-establishment*]. Georgia supported the state church through a liquor tax. *Id*. at 2154. Other states limited political participation to members of the state church. *Id*. at 2178. The Establishment Clause was designed to protect these state choices and let the states choose the time and manner of disestablishment. If it protects an individual right at all, the Establishment Clause protects only against legal coercion of religious orthodoxy. *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring)

There is no coercion by the state when a public employee engages in private, silent prayer. Indeed, there is no action by the state at all. The state has no interest in prohibiting petitioner from kneeling in prayer midfield after football games. Similarly, schools and other public employers have no legitimate interest in preventing employees from silently praying in thanksgiving for their meals at lunchtime, or in prohibiting a teacher or other employee from appearing on campus or at work on Ash Wednesday after receiving the sign of the cross in ashes on his forehead. No one is coerced into religious practice by a public employee's religious actions.

In this case, the school district is not protecting individuals from religious coercion. Instead, it seeks to forbid its employees from acknowledging their obligations to their God "while they are on the clock." This prohibition announces a state policy of hostility toward religion. Nothing in the Establishment Clause supports such hostility.

II. The Free Exercise Clause Prohibits State Hostility Toward Religion

The Establishment Clause forbids legal coercion. But there is no coercion when a public employee kneels in prayer, makes the sign of the cross, wears a hijab or a kippa. These are all private religious exercises, and they involve no state coercion. Religious expression is protected by the Constitution. There is no privilege for official government hostility toward the religious beliefs and actions of its employees.

As this Court noted in *Rosenberger*, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828. That is basic law governing freedom of speech. The rules do not change if the speaker has a religious message. Public expression of religious belief is specifically protected by the Free Exercise Clause of the First Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943). The Free Exercise Clause protects a freedom to believe and a freedom to act on that belief. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

Time and again this Court has noted that government neutrality toward religion is required by the Constitution. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017); *Everson v. Board of Education of Ewing*, 330 U.S. 1, 16 (1947). The state is prohibited from subjecting religious observers to unequal treatment. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). As this Court noted in *Trinity Lutheran*, the Court's decisions in this area make clear that a state policy im-

posing "a penalty on the free exercise of religion triggers the most exacting scrutiny." *Trinity Lutheran*, 137 S.Ct. at 2021.

The Constitution requires accommodation of religious belief, and it prohibits hostility. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The *Lynch* Court noted that hostility toward religion "would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Id.* (*quoting McCollum v. Board of Education*, 333 U.S. 203, 211-12 (1952)); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952). Even vital state interests must give way when they interfere with rights protected by the Free Exercise Clause. *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972). Here, however, there is no countervailing state interest.

Petitioner in this case was fired for engaging in silent prayer. But engaging in prayer is "unquestionably" protected by the Free Exercise Clause. *Sause v. Bauer*, 138 S.Ct. 2561, 2562 (2018). There is no allegation here of a superior state interest, such as interfering with law enforcement activity. *Id.* Instead, there is only the claim that the Constitution requires hostility toward public displays of faith by public employees. Government may not, however, convey the impression "that religious activities are disfavored." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring). The Constitution forbids hostility toward religion, it does not privilege such hostility.

CONCLUSION

Official hostility toward religious expression and practice has no place in our constitutional order. The state violates the Free Exercise Clause when it punishes its employees for engaging in private prayer.

March, 2022 Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
CONSTITUTIONAL COUNSEL GROUP
174 W. Lincoln Ave., #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae