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 U.S. Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* MOUNTAIN STATES LEGAL FOUNDATION AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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.

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (*amicus curiae* in support of petitioner); *303 Creative LLC v. Elenis*, — S. Ct. — (2022) (*amicus curiae* in support of petitioner).

Founded in 1976, Southeastern Legal Foundation ("SLF") is a national nonprofit, legal organization that advocates to protect individual rights and the framework set forth to protect such rights in the Constitution. For 46 years, SLF has advocated, both in and out of the courtroom, for the protection of our First Amendment rights. This aspect of its advocacy is reflected in regular representation of

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

those challenging overreaching governmental actions in violation of their freedom of speech and religion.

SLF has an abiding interest in the protection of the freedoms set forth in the First Amendment—specifically the freedom of speech and the freedom to exercise one's religion. This is especially true when the law suppresses free discussion and debate on public issues that are vital to America's civil and political institutions, and when the law suppresses one from expressing his or her religious beliefs. SLF is profoundly committed to the protection of American legal heritage, which includes all of those protections provided for by our Founders in the First Amendment.

To secure these interests, MSLF and SLF file this *amici curiae* brief urging this Court to reverse the holding of the Ninth Circuit Court of Appeals.

STATEMENT OF THE CASE

I. Historical Background

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. CONST. AMEND. I.

The First Amendment owes its existence to the Founders and Framers' intent to preserve the rights of the individual against the expansive government they were establishing. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these

Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness[.]"); 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834) (Madison: "First, That there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from, the people.").

America's Founders and Framers were particularly concerned with the establishment of a coercive national religion. "Religious tyranny, for early Americans, was exemplified by the Church of England—or more ghastly still, by Popery—in which a central government dictated to everyone the terms of Christian worship." Jed Rubenfeld, *Did the Fourteenth Amendment Repeal the First?*, 96 MICH. L. REV. 2140, 2142 (1998). Legislative history surrounding enactment of the Establishment Clause shows the Framers were concerned with protecting freedom of conscience, not with religious neutrality. *See* 1 ANNALS OF CONG. 451, 458, 796 (1789) (Joseph Gales ed., 1834).

By its text, the First Amendment was originally intended only to expressly prevent Congress from infringing upon individuals' natural right to the free expression of their religion. U.S. CONST. AMEND. I. ("*Congress* shall make no law . . ." (emphasis added)). Expressions of religious sentiment by political figures, even from the pulpit, were not viewed as violative of the Establishment Clause. For instance, presidents since George Washington have included "so help me

God" in the Presidential oath of office. *McCreary Cty., Ky. v. Am. Civ. Liberties Union of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting).

Many states followed the example of the federal government and included religious freedom clauses in their own constitutions. *See, e.g.,* VA. CONST. art. I, § 16 ("[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience[.]"); WI. CONST. art. I, § 18 ("The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed[.]").

More recently, the protections of the First Amendment have been incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *See* U.S. CONST. AMEND. XIV; *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the Free Speech Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause); *Everson v. Bd. of Ed. Of Ewing Twp.*, 330 U.S. 1, 18 (1947) (incorporating the Establishment Clause).

II. Factual and Procedural Background

On August 9, 2016, Petitioner Joseph A. Kennedy ("Coach Kennedy"), brought two claims under 42 U.S.C. § 1983, and five claims under Title VII of the Civil Rights Act of 1964 against Bremerton School District. *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1231–32 (W.D. Wash. 2020). Coach Kennedy was a public-school employee and coach of the Bremerton High School football team. He was put

on administrative leave for praying on the 50-yard line at the end of the high school football games he coached. *Id.* at 1232.

On August 24, 2016, Coach Kennedy "moved for a preliminary injunction on his First Amendment claims" under Section 1983. *Id.* The court denied that injunction on September 19, 2016. *Id.*

When Coach Kennedy appealed to the Ninth Circuit, the court "affirmed on the basis that Kennedy's prayers were delivered in his capacity as a public employee and were thus unprotected speech." *Id.* (citing *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017)).

Coach Kennedy then petitioned this Court, which denied his request. *Id.* (citing *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634 (2019)).

Subsequently, "both parties [] moved for summary judgment on all seven of Kennedy's claims[,]" and the district court denied Coach Kennedy's motion for summary judgment on March 5, 2020. *Id.* at 1232, 1245.

Coach Kennedy appealed to the Ninth Circuit a second time. *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004 (9th Cir. 2021). The court summed up its holding by stating, "[t]he record before [the court] and binding Supreme Court precedent compel the conclusion that [Bremerton School District] would have violated the Establishment Clause by allowing Kennedy to pray at the conclusion of football games,

in the center of the field, with students who felt pressured to join him." *Id.* at 1022–23.

The Ninth Circuit denied Coach Kennedy's petition for *en banc* review. *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910 (9th Cir. 2021) (mem.). The divided court issued two concurrences, one separate opinion, and three dissents. *Id.*

Coach Kennedy petitioned this Court for review and on January 14, 2022, this Court granted *certiorari*. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 857 (2022) (mem.).

SUMMARY OF THE ARGUMENT

This case presents this Court with an opportunity to authoritatively resolve tension in modern jurisprudence between the Free Speech and Free Exercise Clauses of the First Amendment and the Establishment Clause.

An individual's rights to free speech and free expression are protected by the First Amendment. U.S. CONST. AMEND. I. Those rights, however, have been infringed in recent decades as courts have allowed the Establishment Clause to chill and quash public expression of religious sentiment. Left unchecked, the Ninth Circuit's broad interpretation of the Establishment Clause further narrows those rights by holding that Coach Kennedy, a public-school employee, cannot say a brief, silent prayer on school

grounds without such prayer impermissibly constituting an establishment of religion in violation of the First Amendment.

A review of the history the Establishment Clause, as well as the history of public prayer in the United States, demonstrates that this hostility toward public prayer does not align with the original public meaning of "an establishment of religion" in 1791. As Justice O'Connor noted, "when we are interpreting the Constitution, 'a page of history is worth a volume of logic.'" *Wallace v. Jaffree*, 472 U.S. 38, 79 (1985) (O'Connor, J., concurring) (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

This Court now has the opportunity to reverse the Ninth Circuit's decision and appropriately interpret the Establishment Clause under an originalist analysis. Under such analysis, the meaning of "an establishment of religion" should be assessed by reviewing: (1) the plain meaning of the text; (2) the public meaning at the time of enactment; (3) available private statements made contemporaneous to drafting and ratifying the First Amendment; and (4) post-enactment history. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws* ("*Presidential Power*"), 104 YALE L.J. 541, 553 (1994).

"[E]ven the least originalist of the justices has approached Establishment Clause cases by saying that 'the 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.'" Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 348 (2002) (quoting *Sch. Dist. Of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)). It is clear from the text of the First Amendment, contemporaneous history, and statements and actions of the Founding Fathers and Framers that the Establishment Clause was meant to protect Americans from coercion into a national religion, not to stamp out all expressions of religion from public life.

By turning a brief, silent prayer by a public-school employee into an Establishment Clause violation, the Ninth Circuit strayed from the original public meaning of the Establishment Clause, thereby improperly expanding its proscriptions and chilling the free speech and free exercise rights of millions of public employees.

Accordingly, this Court can reverse the judgment of the Ninth Circuit Court of Appeals.

ARGUMENT

I. The Ninth Circuit's Broad Interpretation of the Establishment Clause Improperly Quashes the Free Speech Rights of Public Employees

The Ninth Circuit's broad interpretation of the Establishment Clause runs afoul of the notion that "[i]t can hardly be argued that either students or 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).

It is impossible to reconcile the Ninth Circuit's premise that:

> [A] teacher tasked with supervising a high school cafeteria would not risk an Establishment Clause violation if she took a moment to give thanks before eating her meal, and . . . the Establishment Clause "can surely accommodate high school students observing a teacher giving thanks for an 'all clear' announcement in the wake of a safety scare[,]"

with the holding that Coach Kennedy's brief, silent prayer is prohibited. *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 928 (9th Cir. 2021) (mem.) *reh'g en banc denied* (quoting *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1015, 1025 (9th Cir. 2021)).

Under the Ninth Circuit's interpretation, a public employee could be fired for saying "one Nation, under God" during the Pledge of Allegiance, for responding "God bless you" after a student sneezes, or for having a cross tattoo visible to students. If this Court does not limit "establishment" to its originalist meaning public employees will feel pressured to self-censor any expression of faith, thereby quelling free speech. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 18 (2004) (Rehnquist, C.J., concurring), *abrogated by Lexmark Int'l., Inc. v. Static Control*

Components, Inc., 572 U.S. 118 (2014) ("On the merits, I conclude that the [] School District [] policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words 'under God,' does not violate the Establishment Clause of the First Amendment."); *Brief of Amici Curiae Congressman Steve Largent and Congressman J.C. Watts in Support of Petitioner*, at *29, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) ("But offense at one's fellow citizens is not and cannot be the Establishment Clause test . . . .").

Alarmingly, the Ninth Circuit's decision further quells free speech because it considers Coach Kennedy's actions following his suspension. The Ninth Circuit held that Kennedy's "prayer in the BHS bleachers (while wearing BHS apparel and surrounded by others) signal[ed] his intent to send a message to students and parents about appropriate behavior and what he values as a coach." *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 826 (9th Cir. 2017). Yet Coach Kennedy's conduct in the BHS bleachers, while he was suspended, was *inarguably* the conduct of a private citizen. *Id.* at 820 ("At the October 30, 2015, game, *which Kennedy attended as a member of the public*, Kennedy prayed in the bleachers while wearing his BHS apparel, surrounded by others, and with news cameras recording his actions.") (emphasis added). Thus, Coach Kennedy's prayer in the bleachers should have been protected, private speech that does not implicate the Establishment Clause.

Considering Kennedy's activity during his off hours and even after he was suspended should not be an element of this Court's Establishment Clause analysis. If it were, a public-school teacher could not attend services at a local mosque on Friday, synagogue on Saturday, or a church on Sunday where students might see him without fear that such attendance might tacitly constitute an establishment of religion by the school where he teaches. The Ninth Circuit's logic creates an impermissible chilling effect on the free speech and free exercise rights of public employees. *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 921 (9th Cir. 2021) (mem.) *reh'g en banc denied* (emphasis in original) ("In reality, religious speech uttered by an individual on school property *can* violate the Establishment Clause if an objective observer would view the speech as stamped with the school's seal of approval.").

If this Court upholds Coach Kennedy's rights to free speech and free exercise and confines the Establishment Clause to its original meaning, Coach Kennedy's prayer is protected, and Bremerton School District does not face an Establishment Clause violation.

II. The Establishment Clause Should be Interpreted Through an Originalist Lens, Consistent with its Meaning at America's Founding

The Religion Clauses of the First Amendment of the United States Constitution declare, "Congress shall make no law respecting an establishment of

religion, or prohibiting the free exercise thereof[.]" U.S. CONST. AMEND. I. "The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level[.]" *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting). "As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience." *Jaffree*, 472 U.S. at 49. The First Amendment was not adopted to erase all expressions of religion from public life—it was adopted to prevent governmental coercion into a national religion.

The public—and the Framers specifically—were worried about intrusion into their conscience by the government, thus:

> 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, 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.

Weisman, 505 U.S. at 640–41 (Scalia, J., dissenting) (emphasis in original) (citing L. LEVY, THE ESTABLISHMENT CLAUSE 3–4 (1986)).

The doctrine of originalism tethers interpretation of a clause or amendment to the Constitution. "Justice Douglas . . . famously asserted that 'it is the Constitution which [a Justice] swore to support and defend, not the gloss which his predecessors may have put on it.'" Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1925 (2017) (alteration in article) (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)).[2]

This Court has often relied on originalism. In *District of Columbia v. Heller*, this Court analyzed the "text and history" of the Second Amendment to reach its conclusion. 554 U.S. 570, 595 (2008). In *Harmelin v. Michigan*, this Court scrutinized the text and history surrounding the Eighth Amendment to determine if the Eighth Amendment requires a proportionality analysis. 501 U.S. 957, 965 (1991); at 967 ("The error of *Solem*'s assumption is confirmed by

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[2] "Originalism maintains both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative." Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921 (2017); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 380 (2013) ("Originalist theory has now largely coalesced around original public meaning as the proper object of interpretive inquiry.").

the historical context and contemporaneous understanding of the English guarantee."); at 977 (discussing what the public understood: "to use the phrase 'cruel and unusual punishment' to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly. The notion of 'proportionality' was not a novelty"). This Court has also used originalism in interpreting the First Amendment. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087–90 (2019) (discussing the First Congress and religious tolerance during the founding).

Justice Scalia warned against the untethered power of judges to interpret the Constitution as they saw fit, unbounded by originalism principles:

> And what you have to ask the non-originalist law professor or whoever else is a non-originalist, "what do you propose?" What does a judge consult, if not the original understanding of the text? What binds the biases of [a] judge? What prevents the judge from simply implementing his own prejudices? What is the standard? . . . If not the original understanding of the text of the Constitution, what are you going to use as a standard? The philosophy of Plato? Natural law? The philosophy of John Raule? Public opinion polls? What do you want to use? If you don't take the words of the Constitution and what they were originally understood to

> mean, what is the standard? The answer is, there isn't any standard.

Antonin Scalia, Assoc. Justice, Supreme Court of the U.S., Speech at the Catholic University of America, Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation (Oct. 18, 1996) *in* https://proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml.[3] With history as a backdrop, there is less room for personal biases in interpretation or uncertainty in outcomes. Using history as a guide means the interpretation won't go adrift since it's secured to the meaning when it was ratified.

A government employee's personal prayer is not coercion. And it is certainly not the type of coercion the Framers sought to prevent when they drafted, and the states ratified the First Amendment.

Under an originalist analysis, the meaning of "an establishment of religion" can be determined through a reproduceable, systematic approach. The four-step process is to assess the: (1) plain meaning; (2) public meaning during ratification; (3) private sentiments; and (4) post-ratification history. *See* Calabresi,

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[3] "It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989)

President's Power, 104 YALE L.J. at 553 (elaborating on this four-step process).

A. Plain Meaning

The original meaning of the Establishment Clause must be grounded in the historic plain meaning of its words, which are discernable from historic documents such as period dictionaries. "Consider the plain meaning of the words of the Constitution, remembering to construe them holistically in light of the entire document." Calabresi, *President's Power*, 104 YALE L.J. at 553; *see Heller*, 554 U.S. at 581 (citing three period dictionaries to determine the meaning of "arms"); *Harmelin* 501 U.S. at 976 (consulting a period dictionary to determine what "unusual" meant in context of the Eighth Amendment).

In short, "[p]eriod dictionaries indicate that the introduction of the participle 'respecting' meant 'in relation to,' 'concerning,' or simply 'about.' Hence, under the text, Congress was prohibited from making a law *about* an establishment . . . . Congress could neither establish religion nor *disestablish* religion." Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn From the Plain Text* ("*The Establishment Clause*"), 22 FEDERALIST SOC'Y REV. 26, 31 (2021) (emphasis in original) (quoting DONALD L. DRAKEMAN, THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY 365, 385 n.88 (Michael D. Breidenbach & Owen Anderson eds., 2020)).

One period dictionary defines "respect" as "regard[] [or] reverence[.]" SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE IN MINIATURE 173 (1851). It was also defined as "regard, esteem, reverence, [or] relation[.]" NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 256 (1806).

Another period dictionary defines "establishment" as "[t]o settle firmly; to fix unalterably[;] [t]o make form; to ratify[;] [t]o form or model[;] [t]o found[.]" SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 714 (1785). Establishment has also been defined as "a settlement[.]" SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE IN MINIATURE 74 (1851).

Thus, the plain text can be understood as Congress can make no law regarding forming or founding a religion.

B. Public Meaning

The original public meaning is crucial in determining what "establishment" meant when the First Amendment was ratified since definitions can shift over time. "[C]onsider next any widely read explanatory statements made about them in public contemporaneously with their ratification." Calabresi, *President's Power*, 104 YALE L.J. at 553. This step is crucial to "shed light on the original meaning that the text had to those who had the recognized political authority to ratify it into law." *Id.*; *Heller*, 554 U.S. at 584 ("From our review of founding-era sources, we

conclude . . ."); *Harmelin*, 501 U.S. at 975 ("[T]he ultimate question is not what 'cruell and usuall punishments' meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment.").

In his dissent in *Weisman*, Justice Scalia stated, "as some scholars have argued, by 1790 the term 'establishment' had acquired an additional meaning—'financial support of religion generally, by public taxation'—that reflected the development of 'general or multiple' establishments, not limited to a single church. But that would still be an establishment coerced *by force of law*." *Weisman*, 505 U.S. at 641 (1992) (Scalia, J., dissenting) (emphasis in original) (quoting L. LEVY, THE ESTABLISHMENT CLAUSE 4 (1986)).

During our Founding Era, the public understood "an establishment of religion" to mean:

> (1) government compelling individuals to engage in a religious practice favored by the established church; (2) government interfering with the internal operations of the established church or of nonconforming churches; (3) government aiding the established church, particularly in the form of taxes earmarked for the state church; and (4) government imposing a religious test to hold public office, vote, or receive a post such as a faculty appointment.

Esbeck, *The Establishment Clause*, 22 FEDERALIST SOC'Y REV. at 34 (citing Stephanie H. Barclay, Brady Earley, & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistic Analysis*, 61 ARIZ. L. REV. 505, 535–36, 538, 541, 548, 556 (2019)).

Former Supreme Court Justice Joseph Story concisely summed the Founding Era public's understanding of "an establishment of religion":

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if the not universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

Jaffree, 472 U.S. at 104 (Rehnquist, J., dissenting) (alteration in Court opinion) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 630–32 (5th ed. 1891)).

Thus, the available public sources surrounding the public understanding of an "establishment of religion" confirm the plain meaning in period

dictionaries and elucidate the public meaning of a prevention of coercion.

C. Private Meaning

What the Framer's said amongst one another or before Congress does not alone establish *public* meaning, but it can help elucidate the public's understanding and inform this Court's inquiry. Private meaning, "consider[s] any privately made statements about the meaning of the text that were uttered or written prior to or contemporaneously with ratification into law." Calabresi, *President's Power*, 104 YALE L.J. at 553 ("These statements might be relevant if, and only if, they reveal something about the original public meaning that the text had to those who had the recognized political authority to ratify it into law.").

The Framers' private statements about the Establishment Clause demonstrate they generally exhibited the same fears as the common person and sought to protect against the same wrongs. "Liberty of the conscience" was of utmost importance. In John Adams' diary, he wrote about meeting with a Quaker who expressed the "importance [of] Liberty of Conscience." DIARY OF JOHN ADAMS (1774), https://founders.archives.gov/?q=%22establishment%20of%20religion%22&s=1111311111&sa=&r=1&sr=. Adams notes that a Quaker named Israel Pemberton stated certain laws "not only compelled Men to pay to the Building of Churches and Support of Ministers but to go to some known Religious Assembly . . . and that he and his friends were desirous of engaging Us, to

assure them that our State would repeal all those Laws." *Id.*

Congress debated several iterations of what would become the First Amendment. Importantly, each version was concerned with prohibiting the establishment of a national religion and protecting freedom of conscience—not with banning religious expression from the public sphere or requiring governmental neutrality to religion.

The U.S. House of Representatives, at the behest of James Madison, first began debating what would become the religion clauses of the First Amendment to the Constitution on June 8, 1789. 1 ANNALS OF CONG. 440 (1789) (Joseph Gales ed., 1834). Madison originally proposed the following language: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.* at 451.

Several weeks later, a Select Committee proposed revised language: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 757. Congress debated this iteration on August 15, 1789. *Id.* Notably, no Member of Congress who spoke during that debate "expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion." *Jaffree*, 472 U.S. at 99 (Rehnquist, J.,

dissenting). Congress took a vote to add the word "national" before "religion." 1 ANNALS OF CONG. 758 (1789) (Joseph Gales ed., 1834).

The language went through two more iterations before landing on its final form. First, the House altered the language to read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.* at 796. Then, the Senate proposed, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." CHESTER ANTIEU, ARTHUR DOWNEY, & EDWARD ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 130 (1964). Ultimately, both the House and the Senate accepted the language that would become immortalized in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. CONST. AMEND. I.

While on the topic of private meaning, it is also important to note what should not be persuasive. Despite this robust history, modern Establishment Clause jurisprudence has erected a "wall of separation" between church and state because of a proposition attributed to Thomas Jefferson. At least as early as 1878, this Court quoted President Thomas Jefferson's letter to the Danbury Baptist Association: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation

between church and state." *See Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802)). But reliance on Jefferson's words is misplaced. Jefferson authored this letter in 1802, approximately thirteen years after ratification of the First Amendment in 1791. More importantly, Jefferson was not involved in the drafting of the Bill of Rights, as he was in France during the time. *See Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting).

Jefferson's words, written over a decade after the First Amendment's passage, and by a man who was not involved in the drafting or ratification process, are far less persuasive than the nearly unanimous publicly understood meaning confirmed by contemporaneous Congressional debates. As Justice Rehnquist said, "[t]he 'wall of separation between church and State' is a metaphor based on bad history. . . . It should be frankly and explicitly abandoned." *Jaffree*, 472 U.S. at 107 (Rehnquist, J., dissenting).

The crux of the original Establishment Clause debates hinged not on neutrality but on coercion, and specifically the concept of liberty of conscience. "It is important to emphasize that the idea of liberty of conscience underlay arguments on all the issues surrounding the relationship between state and religion in early America." Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. at 381. "In fact, there was much discussion of state establishment through the lens of liberty of conscience and precious little discussion of

establishment in other terms." *Id.* For the Framers, the primary concern was that liberty of conscience would be violated if citizens were required or coerced to pay taxes in support of religious institutions with which they did not agree. *Id.* at 351; *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring) (quoting *Elk Grove*, 542 U.S. at 52 (Thomas, J., concurring)) ("The Framers understood an establishment 'necessarily [to] involve actual legal coercion.'").

D. Post-Enactment History

If this Court is unconvinced after carefully analyzing contemporaneous dictionaries, public statements, and Congressional discussions, post-enactment history—the period immediately following ratification—is the final interpretive stop on the quest for original public meaning. Calabresi, *President's Power*, 104 YALE L.J. at 553. ("If ambiguity still persists, consider lastly any post enactment history or practice that might shed light on the original meaning the constitutional text had to those who wrote it into law."); Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. at 377 ("The text of the Constitution itself, including its structural design, is a primary source of that public meaning, but extrinsic sources of specifically historical information might also elucidate the principles embodied in the text of the Constitution.").

Our Nation's history demonstrates the Ninth Circuit's interpretation that strictly banishes any demonstrative religious activity is flawed. Indeed, all three branches of the federal government have a long

history of including prayer in their official activities, dating back to the Founding Era.

i. Legislative Branch

To determine that those who drafted and debated the First Amendment did not intend a strict bar on all public religious activity, one need look no further than other activities engaged in contemporaneously by that Congress. "The day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim 'a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many signal favours of Almighty God.'" *McCreary Cty., Ky. v. Am. Civ. Liberties Union of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (quoting H.R. Jour., 1st Cong., 1st Sess., 123 (1826 ed.)).

That same Congress reenacted the Northwest Territory Ordinance of 1787. Article III of the Northwest Ordinance stated: "Religion, 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. 50.

Understanding our Nation's longstanding tradition, later Congresses have similarly promulgated references to God and prayer. "In God We Trust" began appearing on American money in the 1860s. *See* 31 U.S.C. § 5114. In 1954, Congress amended the Pledge of Allegiance to include the phrase "Under God." H.R.J. Res. 243, 83rd Cong. (1954). Congress also adopted the phrase "In God We

Trust" as the official U.S. motto and mandated its appearance on currency in 1956. H.R.J. Res. 396, 84th Cong. (1956).

ii. Judicial Branch

This understanding was not confined to members of Congress. John Marshall's Supreme Court opened sessions with "God save the United States and this Honorable Court." 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 469 (rev. ed. 1926). "The Supreme Court Building itself includes depictions of Moses with the Ten Commandments in the Courtroom and on the east pediment . . . and symbols of the Ten Commandments 'adorned the metal gates lining the north and south sides of the Courtroom as well as the doors.'" *McCreary*, 545 U.S. at 906 (Scalia, J., dissenting) (quoting *Van Orden*, 545 U.S. at 688).

iii. Executive Branch

George Washington added the words "so help me God" to the Presidential oath of office. *McCreary*, 545 U.S. at 855 (Scalia, J., dissenting). In his Farewell Address, he reminded his fellow citizens that "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." Farewell Address (1796), *reprinted in* 35 WRITINGS OF GEORGE WASHINGTON 229 (J. Fitzpatrick ed. 1940). Both James Madison and James Monroe, among others, made similar invocations to God in their Presidential inaugural addresses. James Madison, First Inaugural Address (March 4, 1809)

("[T]hat Almighty Being whose power regulates the destiny of nations, whose blessing have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude. . ."); James Monroe, Second Inaugural Address (March 5, 1821) ("[W]ith the protection of Almighty God, I shall forthwith commence the duties of the high trust to which you have called me."). President John Adams wrote to the Massachusetts Militia that "[o]ur Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other." Letter from John Adams to the Massachusetts Militia (Oct. 11, 1798).

This understanding was not limited to our earliest presidents. Abraham Lincoln invoked God in his Second Inaugural Address. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865) ("With malice toward none, with charity for all, with firmness in the right as God gives us to see the right . . ."). In his Inaugural Address, John F. Kennedy implored his fellow citizens to "ask[] His blessing and His help . . . knowing that here on earth God's work must truly be our own." John F. Kennedy, Inaugural Address (Jan. 20, 1961). Ronald Reagan spoke of "the shining city" in his Farewell Address, and closed by saying "goodbye, God bless you, and God bless the United States of America." Ronald Reagan, Farewell Address to the Nation (Jan. 11, 1989).

Even earlier this century, President George W. Bush's address following the tragic events of 9/11 ended with "God bless America." *McCreary*, 545 U.S. at 855 (2005) (Scalia, J., dissenting). As recently as

2010, this Court noted, "[t]he president cannot be denied the prerogative of making such a religious reference . . . because doing so would abrogate his First Amendment rights." *Newdow v. Roberts*, 603 F.3d 1002, 1010 (D.C. Cir. 2010).

If the President of the United States can publicly acknowledge God—even during official governmental proceedings—without violating the Establishment Clause, it seems inexplicable that a high school football coach's brief, silent prayer could constitute such a violation.

III. Coach Kennedy's Prayer is Not Coercive and Cannot Put Bremerton School District in Violation of the Establishment Clause

Based on the overwhelming historical evidence presented above, the ratification of the First Amendment's Establishment Clause prevented an establishment of—and coercion into—a national religion. *Weisman*, 505 U.S. at 642 (quoting *Am. Jewish Cong. v. Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)) ("The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that '[s]peech is not coercive; the listener may do as he likes.'").

It is difficult to know how the Framers of the First Amendment would have felt about prayer in public schools for one simple reason: "free public education was virtually nonexistent in the late 18th

century." *Jaffree*, 472 U.S. at 80 (1985) (O'Connor, J., concurring). It is notable, however, that beginning in the late 18th and through the 19th century, Congress appropriated public moneys for sectarian Indian education. *Id.* at 103–04 (Rehnquist, J., dissenting).

By the late 19th century, public school education was available to most children across the United States. Nancy Kober & Diane Stark Renter, *History and Evolution of Public Education in the US*, George Washington University Center for Education Policy (2020), https://files.eric.ed.gov/fulltext/ED606970.pdf. These schools were hardly insulated from religion, however, "[u]ntil about 1940, daily prayer, recitation of religious materials, and the recitation of the Pledge of Allegiance, were widely accepted—even expected in public schools. It was not until the 1960s that the Court built a foundation of case law upholding the proverbial 'wall separating church and state.'" Brett A. Geier & Annie Blankenship, *Praying for Touchdowns: Contemporary Law and Legislation for Prayer in Public School Athletics*, 15 FIRST AMEND. L. REV. 381, 393–94 (2017). Indeed, until 1945, case law was generally concerned with *protecting religion from state intrusion*—it is only since 1945 that the courts began to shift to *protecting the state from religion*. *Id.* at 395.

In 1947, this Court discussed the First Amendment's alleged "wall between church and state" while allowing state transportation to both public and parochial schools. *Everson v. Bd. of Ed. Of Ewing Twp.*, 330 U.S. 1, 18 (1947).

In 1948, this Court determined that religious education on public school grounds violated the Establishment Clause. *Ill. ex rel. McCollum v. Bd. of Ed. Of Sch. Dist. No. 71, Champaign Cty., Ill.*, 333 U.S. 203, 231 (1948).

In 1962, this Court deemed officially sanctioned prayers in public schools unconstitutional. *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

In 1963, this Court developed a "secular purpose" test to analyze ostensibly religious activity in public schools. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 222 (1963).

Throughout the 1940s, '50s, and '60s, federal courts demonstrated an increasing hesitancy towards religion in public schools. This line of jurisprudence culminated with the establishment of the *Lemon* Test in 1971. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Modern Establishment Clause jurisprudence has since severely limited religion and religious expression in public schools, almost to the point of hostility. This case presents this Court with the rare opportunity to provide clarity on the various tests employed by this Court to evaluate claimed Establishment Clause violations.

If this Court applies originalism principles to Coach Kennedy's conduct, therefore asking if his conduct was coercive, it need not look any further than Justice Thomas' concurrence in *Van Orden v. Perry* for its analysis. 545 U.S. at 692. The question in *Van Orden* was "whether the Establishment Clause of the

First Amendment allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds." *Id.* at 681. Petitioner passed the Ten Commandments on his way to the law library on numerous occasions and sought "both a declaration that the monument's placement violates the Establishment Clause and an injunction requiring its removal." *Id.* at 682. This Court held, "[w]e cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment." *Id.* at 692.

Clarity abounds from analyzing the case under originalist principles:

> There is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional. In *no sense does Texas compel petitioner Van Orden* to do anything. The only injury to him is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. *He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life*. The mere presence of the monument along his path *involves no coercion* and thus does not violate the Establishment Clause. . . .Much, if not all, of this would be avoided if the Court would return to the views of the Framers and *adopt coercion as the touchstone for our Establishment Clause inquiry*. Every

> acknowledgement of religion would not give rise to an Establishment Clause claim. Courts would not act as theological commissions, judging the meaning of religious matters. Most important, our precedent would be capable of *consistent and coherent application*.

Id. at 694, 697 (Thomas, J., concurring) (emphasis added).

Coach Kennedy's brief, quiet prayer has the same coercive affect as the Ten Commandments on the Texas Supreme Court Library wall—none. Just as the Ten Commandments can be ignored, so can Coach Kennedy's prayer. *See id.* at 694–95 (quoting *Cty. Of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 664 (1989)) (brackets in *Van Orden*) ("[T]his Court's precedent permits even the slightest public recognition of religion to constitute an establishment of religion. . . . In every instance, the litigants are mere '[p]assersby . . . free to ignore [such symbols or signs], or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.'").

Just as the Ten Commandments do not jump off the wall and demand a passerby to drop to his knees and pray, neither does Coach Kennedy's brief, quiet prayer. Coach Kennedy is not "psychologically coerc[ing] [students] to bow their heads, place their hands in a Dürer-like prayer position, pay attention to the prayers, utter "Amen," or in fact pray." *Weisman*, 505 U.S. at 637 (Scalia, J., dissenting).

Rather he is asking for the tolerance the Establishment Clause allows—to pray in public as a government employee.

The plain meaning, public meaning, private meaning and the history of "an establishment of religion" all evidence that such a weak interpretation of coercion was not what the Framers nor the public feared, nor what the First Amendment protects against.

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The long history of the Establishment Clause shows that hostility toward public prayer—even public prayer by a government employee in schools—is founded merely in modern jurisprudence; it is not constitutional or historically moored. Indeed, "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Weisman*, 505 U.S. at 598. Such attempts certainly quash the free speech rights of individuals like Coach Kennedy who are forced to stay silent or lose their jobs. Following originalism principles will not only resolve an area of muddled jurisprudence but will ensure constitutionally protected rights are not diminished by modern interpretations and temptations.

For these reasons, the Establishment Clause should be reinterpreted through an originalist lens and returned to its historical and constitutional roots.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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