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 LIBERTY COUNSEL IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

Amicus, Liberty Counsel, is an international nonprofit legal organization that has been substantially involved in defense of First Amendment rights for over three decades. Liberty Counsel represents petitioners before this Court in *Shurtleff v. City of Boston* (No. 20-1158), which, like this case, involves significant questions about the scope of the government speech doctrine. Through its First Amendment litigation, Liberty Counsel has developed a substantial body of information regarding the questions presented here. Amicus believes that the information provided in this Brief regarding vital clarification on the breadth of the government speech doctrine, a proper understanding of the Establishment Clause when used by a government entity as a defense to viewpoint discrimination, and the need to revisit *Smith* are critical to this Court's consideration of the important questions at issue.

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than Amicus Curiae or its counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners and Respondents have filed blanket consents to the filing of Amicus Briefs in favor of either party or no party

SUMMARY OF ARGUMENT

The Bremerton School District's ("the District") concession that it targeted the Petitioner Coach Kennedy's speech because it was religious is fatal to its government speech, free speech, and free exercise arguments. Significantly, each one of those claims is subject to the limitations of the Establishment Clause, which means the District's *admitted* overt hostility toward Coach Kennedy's speech because it is religious violates the Establishment Clause.

The District's primary argument is that Coach Kennedy's speech is government speech and, as a result, there is no constitutional violation in censoring it. Unfortunately, *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 568-69 (1968), and the government speech cases do not answer the question of whether all speech by school employees is considered government speech when the employee's speech neither falls within the scope of the employee's job duties nor involves speaking out on a matter of public concern. Unless the Court is prepared to reverse a century's worth of precedent holding that teachers do not shed their First Amendment rights at the schoolhouse gates, the Ninth Circuit's expansive interpretation of the government speech doctrine must be reversed.

The Ninth Circuit and the District also fail to recognize that even if Coach Kennedy's quiet prayer after the game is somehow government speech, then the District violated the Establishment Clause

through its admitted targeting of Coach Kennedy's speech because it was religious. This Court has plainly stated that "government speech must comport with the Establishment Clause." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). Thus, while the government is able to express certain viewpoints when it is speaking for itself, it is still subject to the Establishment Clause's limitation that it not engage in hostility toward religion. Here, because the District prohibited Coach Kennedy's speech because of its religious viewpoint, the District violated the Establishment Clause.

Similarly, the District's only defense to Coach Kennedy's free speech and free exercise claims is that it targeted his religious speech in an effort to avoid a *possible* Establishment Clause violation. However, the District's justification for *actually* infringing Coach Kennedy's free speech and free exercise rights cannot be its desire to avoid a *possible* Establishment Clause violation on the part of hypothetical observers who might misperceive the District's response to the Coach's prayer.

This Court should reject the District's arguments that Coach Kennedy's prayer is government speech and conclude that the District violated the First Amendment when it engaged in viewpoint discrimination against Coach Kennedy's private speech.

LEGAL ARGUMENT

I. COACH KENNEDY'S PRAYER IS PROTECTED PRIVATE SPEECH.

For more than a century, this Court has affirmed that in the public-school context, neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Indeed. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to *teachers* and students." *Id.* at 506 (emphasis added). A parallel doctrine acknowledges that government can place some limits on the speech of its employees to restrict speech that impedes the proper functioning of the workplace. *Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205,* 391 U.S. 568 (1968). Yet, even in *Pickering*, this Court acknowledged that the notion that "teachers may be constitutionally compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest . . . proceeds on a premise that has been *unequivocally rejected* in numerous prior decisions of this Court." *Id.* at 568 (emphasis added).

Thus, under certain circumstances (not present here), employee speech can be treated as government speech rather than private speech. The Ninth Circuit, however, adopted a perspective that transforms virtually all speech by government employees as government speech while they are on

duty or on school premises.[2] Unless this Court reverses the Ninth Circuit's expansive interpretation of the government speech doctrine, public school employees will be left with no protections for their private speech.

A. Public Employees Do Not Shed Their Constitutional Rights As A Condition Of Government Employment.

For the past seventy years, this Court has consistently affirmed that public employees do not relinquish their First Amendment rights when they accept government employment. Rather, they retain their First Amendment rights *subject only* to the employer's need to regulate employee speech that impedes the proper functioning of the workplace. *See Pickering v. Board of Ed. Of Tp. High Sch. Dist. 205*, 391 U.S. 568-69 (1968) (citing prior Supreme Court precedent); *see also Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (employee speech is subject to some limitations because it can sometime "contravene governmental policies or impair the proper performance of government functions").

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[2] This brief refers to three separate opinions in this case: the Ninth Circuit opinion from which this Court granted certiorari (*Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004 (9th Cir. 2021)); the Ninth Circuit opinion denying *en banc* review (*Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910 (9th Cir. 2021)); and this Court's denial of certiorari in 2019 (*Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634 (2019)).

For more than a century, this Court has affirmed that, in the public-school context, neither students *nor teachers* "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *See Tinker*, 393 U.S. at 506. In *Tinker*, school officials banned and sought to punish the students who wore black armbands in protest to the Vietnam conflict. *Id.* at 504. The school district claimed that its fears of how some observers might perceive the students' speech provided justification for censoring the private speech of such students.

Despite the school's contentions to the contrary, there was no evidence that wearing the armbands *actually* interfered with the school operations or with the rights of other students. *Id.* at 508. This Court rejected the school's argument that a *possible* disturbance was enough to censor speech.

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another may start an argument or cause a disturbance. *But our Constitution says we must take that risk.*

Id. (emphasis added).

Indeed, "to justify prohibition of a particular expression of opinion, [the school] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. Rather, the school must establish that the censored speech would have "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school . . . ." *Id.* Otherwise, "the prohibition cannot be sustained." *Id.*

To adequately protect the cherished First Amendment rights of teachers, there must be a similar limiting principle to the government speech doctrine as it applies to public school employees. Just as in *Tinker*, schools cannot censor all expressive activity of its employees while they are on duty or on school premises out of undifferentiated fear of how observers (no matter how ill-informed they may be) will perceive the expressive activity.

In *Pickering*, this Court specifically examined the free speech rights of teachers. 391 U.S. at 568. The government speech test that grew out of *Pickering* and its progeny is premised on the fact that schools must retain some control over certain speech by its teachers. The goal is to "balance 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." *Id.*

The public-school teacher in *Pickering* sent a letter to a local newspaper concerning a recently proposed tax increase. *Id.* at 564. The letter was critical of how the School Board and superintendent had handled the past proposals to raise revenue. *Id.* The Board determined that the teacher's publication was "'detrimental to the efficient operation and administration of the schools of the district'" and dismissed him. *Id.*

Even after concluding that the teacher's letter contained erroneous public statements that were critical of his employer upon issues then currently the subject of public attention, this Court reversed the lower courts, explaining that the statements did not impede, "*nor can be presumed* to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id.* at 572-73 (emphasis added). In such a circumstance, this Court "conclude[d] that the interest of the school administration in limiting teacher's opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573. Thus, even though public schools, as government employers, need to retain control over speech that is properly attributable to the government as speaker, the school can no more limit a teacher's private speech than it could the private speech of any member of the public. To hold otherwise would necessarily mean teachers do, in

fact, shed their constitutional rights at the schoolhouse gate. Such is not the law.

Similar to *Tinker*'s rejection of the school's censorship of student speech based on undifferentiated fear of a disturbance, *Pickering* does not permit schools to *presume* employee speech that the school disapproves of necessarily impedes the teacher's performance of his daily duties or interferes with the regular operation of the schools. *Garcetti*, 547 U.S. at 417.

Pickering and subsequent case law have established a two-fold inquiry to determine whether the employee speech is protected private speech or government speech: whether the employee spoke as a citizen on a matter of public concern and, if so, whether the government employer had an adequate justification for treating the employee's speech differently from any other member of the general public. *Id.* at 418.

In *Garcetti*, the parties agreed that the plaintiff drafted the memorandum at issue as part of his official job duties, which made the memorandum government speech. *Id.* at 421. Far from standing for the proposition that all speech by a government employee while they are at work or on duty constitutes government speech, *Garcetti* explicitly rejected such a contention. Indeed, "a citizen who works for the government is nonetheless a citizen," and "[t]he First Amendment limits the ability of 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.

In direct contrast to the Ninth Circuit's formulation below, this Court specifically stated that it did not "articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 424. This Court cautioned that employers cannot "simply restrict employees' speech rights by creating excessively broad job descriptions." *Id.* When the government creates an excessively broad job description, it can "silence or muffle expression of disfavored viewpoints." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). That is precisely what the Ninth Circuit's decision below facilitates.

Striking the proper balance between government speech and private speech may be a difficult question in some instances, but important First Amendment protections are abandoned if the government is given free rein to label all speech by government employees as government speech. Rather, the "critical question" under *Garcetti* is whether the speech at issue is, itself, ordinarily within the scope of an employee's duties. *Lane v. Franks*, 573 U.S. 228, 240 (2014). And, this Court has explained that the "controlling factor" and "significant point" in *Garcetti* was that the memorandum was made pursuant to his official duties "in his or her professional capacity." 547 U.S. at 422.

What *Pickering* and the government speech cases do not address is whether all expressive activity by school employees is considered government speech when the expressive activity does not fall within the scope of the employee's job duties but also does not involve the employee's speaking out on a matter of public concern. When, however, the public employees' expression falls outside their official job duties, employees should not be compelled to relinquish their First Amendment rights. *See Kennedy*, 4 F.4th at 933 (O'Scannlain, J., opinion) (quoting *Pickering*, 391 U.S. at 568). Indeed, "[t]he Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti*, 547 U.S. at 417.

The Ninth Circuit opinion rests on the premise that "teachers always act as teachers between the first and last bell of the school day (or that coaches always act as coaches from the time they arrive for work at the school's athletic office to the moment the stadium lights go out at the end of the game)." *Kennedy*, 4 F.4th at 935 (O'Scannlain, J., opinion). The opinion irreconcilably conflicts with this Court's precedent that teachers do not forfeit all First Amendment protections when they enter the schoolhouse gate. If all First Amendment expressive activity in the presence of students is deemed unprotected government speech, then there "would be little left of *Tinker*'s landmark holding." *Id.*

Unquestionably, what teachers say in a classroom while teaching falls squarely within their

job descriptions and are made pursuant to their official duties. *See Lee v. York Co. Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007) (speech that is curricular in nature is not of public concern). Thus, when public-school employees are making statements as part of their official duties, the employees are not speaking as private citizens for First Amendment purposes but are treated as government speakers. *Garcetti*, 547 U.S. at 421.

In contrast, public school employees can be on school property during school hours without their speech constituting government speech. In *Eagle Point Educ. Assoc'n v. Jackson,* when a district learned of an upcoming teacher strike, it adopted a resolution prohibiting any picketing on any district owned or leased properties. 880 F.3d 1097, 1101 (9th Cir. 2018). Another resolution prohibited any striking teachers from entering school property even if there for reasons unrelated to the strike. *Id.* Finally, another resolution prohibited any signs or banners on school property without advance, written approval by the superintendent. *Id.*

During the strike, the district enforced all of the resolutions – turning striking employees away from school grounds and directing them to stay off district property regardless of why they were on the property. After employees sued, the district took the position that the teachers' actions constituted government speech and were, thus, unprotected. *Id.* at 1102. The court explained that the "government speech doctrine would be relevant to those policies only if observers might reasonably have concluded

that the District itself endorsed the pro-strike positions which Plaintiffs sought to express." *Id.* at 1104. The court then concluded that "a reasonable observer would not think that the pro-strike message of the strikers or their supporters was a statement made or endorsed by the District." *Id.* That was particularly true given that the District superintendent acknowledged that the activities engaged in by strikers were not sponsored by the District. *Id.*

The Eighth Circuit decision in W*igg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807 (8th Cir. 2004) is also instructive on this point. In that case, the school district prohibited an elementary school teacher from participating in a Christian-based after school program. The Good News Club met immediately after school, on school property. The school argued that permitting its employees to participate in such a program would violate the Establishment Clause and that avoiding an Establishment Clause concern "constitute[d] a compelling reason to justify the restriction." *Id.* at 814.

The Eighth Circuit rejected the school's argument, concluding that the teacher's participation in the Good News Club constituted private speech, not government speech. *Id.* at 815. The court refused to apply *Pickering* to the teacher's speech because the facts did not demonstrate "a connection between [the teacher's] private speech and the functioning of the school." *Id.* at 815 n.5. The Eighth Circuit properly understood that not all speech of a teacher (or coach) that takes place on

school property immediately after the school day (or football game) constitutes government speech. And, the reason for that is simple: the school's "desire to avoid the appearance of endorsing religion does not transform [a teacher's] private religious speech into a state action in violation of the Establishment Clause." *Id.* at 815.

The Ninth Circuit's decision below, however, rests squarely on a presumption that every moment of every day that Coach Kennedy is on school property, he has no free speech rights. The Ninth Circuit characterized Coach Kennedy as "one of those especially respected persons chosen to teach on the field, in the locker room, and at the stadium" and "clothed with the mantle of one who imparts knowledge and wisdom." *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1015 (9th Cir. 2021). The Ninth Circuit concluded that Coach Kennedy was on duty and speaking for the government any time he was on or near the filed while others were near him or observed him. *Id.* As a result, the Ninth Circuit concluded that Kennedy's brief, silent prayer on the field, while visible to students, constituted unprotected government speech. *Id.*

The Ninth Circuit plainly ignored *Garcetti*'s admonition and permitted the District to create an excessively broad job description for Coach Kennedy. As Judge O'Scannlain explained, the Ninth Circuit's interpretation of the government speech doctrine would treat as government speech a brief, quiet prayer said by a teacher who had just received bad news about a family member; the sign of the cross

made by a coach upon seeing a player suffer an injury, the kneeling by a coach during the national anthem, or a presidential bumper sticker on a car parked at the school. 4 F.4th at 936 (O'Scannlain, J., opinion).

In his statement responding to this Court's 2019 denial of certiorari, Justice Alito also expressed concerns about the Ninth Circuit's interpretation of *Garcetti*. *See Kennedy*, 139 S. Ct. at 636-37 (Alito, J., statement). The Ninth Circuit responded to some of those concerns, stating that its first decision "should not be read to suggest that, for instance, a teacher bowing her head in silent prayer before a meal in the school cafeteria would constitute speech as a government employee." 991 F.3d at 1015. The Ninth Circuit concluded that the silent prayer by the teacher in the cafeteria was "of a wholly different character" than Kennedy's silent prayer on the field after the game. *Id.*

To support its conclusion, the Ninth Circuit offered two explanations. First, "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." *Id.* However, those same reasons would lead to the conclusion that the silent prayer in the cafeteria was government speech: students would be next to the teacher, others (students, teachers, and other school employees) in the room would be watching the teacher pray, and ostensibly the teacher could be seated at the center table. But somehow the lunch-room prayer is private speech while Coach Kennedy's speech is government

speech. *Cf. Kennedy*, 4 F.4th at 936 (O'Scannlain, J., opinion) (referring to the Ninth Circuit's conclusion on the lunch-room prayer, the "opinion's *ipse dixit* exception for mealtime prayer defies its own logic and surely will not be taken seriously by litigants or courts attempting to apply this sweeping rule to many scenarios yet to come").

The Ninth Circuit also relied on Coach Kennedy's acknowledgement that he serves as a mentor and role model to students to justify suppressing his speech. *Kennedy*, 991 F.3d at 1015. That fact, however, does not answer the key question – whether he was free at that time (after the game) to engage in any private speech, even if for a brief moment. *Cf. Kennedy*, 139 S. Ct. at 637 (Alito, J., statement) ("What is perhaps most troubling . . . is language that 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 – even when the coach is plainly not on duty.").

For example, could he have made a private call to a family member while standing on the fifty-yard line; had a private conversation with someone on a topic wholly unrelated to the game or his coaching duties; knelt on the fifty-yard line for any reason unrelated to silent prayer; or made a dinner reservation? To press the matter further, is every spoken word or action by a public teacher or coach on the playing field treated as government speech every moment while on duty or at school? Does that include, for example, all actions and speech in the

breakroom, locker room, playing field, or a private conversation between two teachers or coaches as they walked down the hall? The answer in this case is clear given that the District admitted that it would not have disciplined Coach Kennedy if he had in engaged in nonreligious speech in the same place at the same time. (Joint Appendix, "JA," 205.)

Thus, even assuming Coach Kennedy was still on duty after the game, the District's policy plainly does not treat all employee speech that occurs during the workday or on school property as government speech. It merely seeks to transform religious speech into government speech to wield a powerful tool of censorship under the pretextual guise of the Establishment Clause.

B. The District Infringed Coach Kennedy's Free Speech And Free Exercise Rights When It Prohibited Coach Kennedy's Prayer.

1. The Free Speech Clause Subjects the District's Viewpoint Discrimination to Strict Scrutiny.

This Court has long held that the government violates the Free Speech Clause "when private speech is censored based on its religious viewpoint." *See Good News Club v. Milford Central Sch.*, 533 U.S. 98, 107 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

Indeed, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The "test for viewpoint discrimination is whether – within the relevant subject category – the government has singled out a subset of messages for disfavor based on the views expressed." *Matal*, 137 S. Ct. at 1766 (Kennedy, J. concurring).

In *Good News Club,* this Court rejected the argument that "reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not." *Good News Club*, 533. U.S. at 113. Government censorship of a religious viewpoint cannot be tolerated. "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression." *Rosenberger*, 515 U.S. at 835.

In this case, the District admits that it targeted Coach Kennedy's speech because it was religious. (Pet. App. 23.) Thus, the District's restriction of Coach Kennedy's religious speech was unquestionably viewpoint discrimination. *See Good News Club*, 533 U.S. at 111 (holding "that something that is 'quintessentially religious' or 'decidedly religious in nature' [such as prayer] cannot also be characterized properly as . . . a particular

viewpoint"). Nothing in the record indicates that Coach Kennedy would have been prohibited from engaging in other speech on the fifty-yard line after the game. He could have high-fived others on the field; given a two-thumbs up to anyone watching; placed a phone call to his family; or, if he desired, done a "happy dance." But because he knelt mid-field, admittedly to quietly pray, the District prohibited his speech.

"Viewpoint discrimination is anathema to free expression and is impermissible in both public and nonpublic fora." *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 296 (3d Cir. 2011) (citing *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992)). This Court has made clear that "restrictions based on viewpoint are prohibited." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). Whether viewpoint discrimination is *per se* unconstitutional or subject to strict scrutiny leads to the same conclusion in this case – that the District unconstitutionally infringed Coach Kennedy's private speech.

The only defense the District has asserted to Coach Kennedy's free speech claim is the District's desire to avoid a *potential* Establishment Clause violation. As discussed *infra*, the District's decision to engage in viewpoint discrimination against religious expression demonstrates hostility – not neutrality – toward religion, which itself violates the Establishment Clause. Thus, the District cannot justify its *actual* censorship of protected First Amendment speech out of concern for a *potential*

Establishment Clause violation based on an observer who misperceives Coach Kennedy's speech as the District impermissibly favoring religion. In the context of private speech, the Establishment Clause is not implicated and cannot serve as the District's compelling interest. *See, e.g., Good News Club*, 533 U.S. at 113-19; *Rosenberger*, 515 U.S. at 838-46; *Lamb's Chapel*, 508 U.S. at 394-96; *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250-53 (1993); *Widmar v. Vincent*, 454 U.S. 263, 270-75 (1981).

2. The District Impermissibly and Unconstitutionally Infringed Coach Kennedy's Right to Free Exercise of Religion.

This Court's decision in *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990), fails to adequately protect free exercise of religion. The *Smith* legacy is one that has given government officials nearly free reign to prohibit a person's free exercise of religious beliefs unless the government officials make disparaging remarks toward religious beliefs during their legal proceedings (*see Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018)) or they carve out so many exceptions to an alleged neutral law of general applicability that it seems clear the target was religious exercise. *See Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

The *Smith* standard *starts with the presumption* that the free exercise of religion is *not* protected against government action unless the aggrieved person can prove the government has targeted religious exercise. In *Fulton v. City of Philadelphia, Pennsylvania,* Justice Alito, joined by Justices Thomas and Gorsuch, set forth critical justifications for overruling *Smith*. 141 S. Ct. 1868 (2021). First, *Smith*'s standard is inconsistent with the language and historical purpose of the clause. The normal and ordinary meaning of the text of the Free Exercise Clause, which says "Congress shall make no law . . . prohibiting the free exercise [of religion]," means "forbidding or hindering unrestrained religious practices of worship." *Fulton,* 141 S. Ct. at 1897 (Alito, J., concurring). Under *Smith*, however, that presumption is reversed: [e]ven if a law prohibits conduct that constitutes an essential religious practice, it cannot be said to 'prohibit' the free exercise of religion unless that was the lawmakers' specific object." *Id.* at 1897-1898.

Second, provisions in the state constitutions at the time of adopting the First Amendment demonstrate that the states extended "broad protection for religious liberty" limited only by conduct "that would endanger 'the public peace' or 'safety.'" *Id.* at 1901. The peace and safety exception did not constitute a broad category under which the government could justify any act in the name of public safety. Rather, it referred to "freedom from danger," "exemption from hurt," and "preservation from hurt." *Id.* In his commentaries, Blackstone provided several examples of actions that would

endanger the public peace and safety, including "riotous assembling of 12 persons or more," "destruction of public floodgates," "provoking breaches of peace," and "public fighting." *Id.* at 1902-1904. Thus, absent a threat to public safety, a person was free to engage in protected religious exercise.

Third, the opinion explained that *Smith* simply does not afford sufficient protection to free exercise rights. In *Smith*, the Court pushed aside nearly thirty years of precedent, holding that "the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice." *Id.* at 1883. Under *Smith*, it is irrelevant whether the "law serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection." *Id.*

Under *Smith,* very little violates the Free Exercise Clause. For example, Justice Alito's opinion explained that if the law implanting the Prohibition Amendment had not contained an exception for sacramental wine, under *Smith*, it could have constitutionally prohibited the celebration of a Catholic Mass anywhere in the United States. *Id.* at 1884. Or, if a State followed the example of some European countries and prohibited the slaughter of an animal that had not first been rendered unconscious, *Smith* would uphold the law even though it would have the effect of outlawing kosher and halal slaughter. *Id.* Or suppose that the Supreme Court or any court in the country enforced

a rule that prohibited attorneys from wearing any form of head covering in court. "The rule would satisfy *Smith* even though it would prevent Orthodox Jewish Men, Sikh men, and many Muslim women from appearing." *Id.* at 1884.

To afford the First Amendment's guarantee of the free exercise of religion appropriate protection, this Court should reverse *Smith* and return to the presumption that an individual's free exercise of religion is protected *unless* the government proves that it has a compelling reason for prohibiting the conduct and that the government's actions are narrowly tailored to achieve that interest. *Cf. Sherbert v. Verner*, 374 U.S. 398 (1963).

II. THE ESTABLISHMENT CLAUSE PROVIDES NO JUSTIFICATION FOR SUPPRESSING COACH KENNEDY'S PRIVATE, RELIGIOUS SPEECH.

A. The Reasonable Observer Test Facilitates An Unconstitutional Heckler's Veto And Should Be Relegated To Its Rightful Place In The Constitutional Graveyard.

Although this Court has held that "a state interest in avoiding an Establishment Clause violation '*may* be characterized as compelling,' and therefore may justify content-based discrimination," this Court has rejected the notion that avoiding an Establishment Clause violation would justify viewpoint discrimination. *See Good News Club v.*

Milford Central School, 533 U.S. 98, 112-113 (2001) ("[A]ccording to Milford, its [viewpoint-based] restriction was required to avoid violating the Establishment Clause. *We disagree*." (emphasis added)). Yet, the Ninth Circuit explicitly endorsed that long-rejected contention and permitted the District to silence Coach Kennedy's speech because of its religious nature. (*See* JA205.)

The District's defense rests on its desire to avoid the *perception* that it approves of Coach Kennedy's religious speech. Because of the Ninth Circuit's erroneous formulation and the concomitant violations of the First Amendment it unquestionably causes, the instant matter presents this Court with an ideal opportunity to reconsider the reasonable observer standard used in Establishment Clause cases. And, this Court should relegate that test to its rightful place in the dustbin of constitutional history. Namely, the Court should clarify for the lower courts and government entities that the Establishment Clause does not mandate (and, in fact, prohibits) converting the public square to religion-free zones.

In fact, if the hypothetical observer were indeed reasonable, this observer would know that the government violates the Establishment Clause with equal force if it is hostile toward religion. *See Van Orden v. Perry*, 545 U.S. 677, 684-85 (2005) (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995) (the risk of pervasive bias or hostility toward religion could undermine the neutrality requirement of the

Establishment Clause); *see also Good News Club*, 533 U.S. at 114 (a "'significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion')" (emphasis in original). All too often, the reasonable observer focuses only on perceived endorsements of religion, *Good News Club*, 533 U.S. at 113-14; *Rosenberger*, 515 U.S. at 838-39; *Lamb's Chapel*, 508 U.S. at 394-96, while turning a blind eye towards hostility.

The reasonable observer should also know that merely tolerating private speech endorsing religion does not implicate Establishment Clause concerns. *See, e.g., Good News Club*, 533 U.S. at 113-119. The Establishment Clause cannot require the government to do what the Free Speech and Free Exercise Clauses forbid the government from doing – removing all religious expression from the public square.

In *Good News Club*, this Court rejected the school district's argument that granting access to the Good News Club, a Christian club, "would do damage to the neutrality principle . . . ." *Id.* at 114. This Court stated that the district's position defied logic because "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* (cleaned up).

In *Rosenberger*, this Court similarly rejected the argument that the religious orientation of the organization receiving funding from the University would be attributed to the University. The Court concluded that there was "no real likelihood that the speech in question is being either endorsed or coerced by the State." 515 U.S. at 842-43. In fact, because the University had "taken pains to disassociate itself from the private speech" of the religious organization, the concern over government endorsement was "not a plausible fear." *Id.* at 841-43.

In this case, the Ninth Circuit started with the question of whether a reasonable observer would view the school's allowing Coach Kennedy's prayer as "'stamped with his or her school's seal of approval.'" *Kennedy*, 991 F.3d at 1017. The Ninth Circuit's conclusion that the reasonable observer would perceive such endorsement despite the fact it is private speech that the District disavowed, 4 F.3d at 937, demonstrates that the reasonable observer test has no place in the delicate balancing between private free speech rights and a government's concern with avoiding the *perception* of endorsing religion. A hypothetical reasonable observer standard that focuses on what someone *might perceive* should not be used to silence *actual,* protected First Amendment activity. When it concerns cherished First Amendment freedoms, *reality* must win over *perception*. The First Amendment demands nothing less.

Therein lies the fundamental problem with the reasonable observer test. The subjective "reasonable observer" test, especially – as here – where speech and religion overlap, is nothing more than a modified heckler's veto. As a matter of black letter law, "the First Amendment knows no heckler's veto." *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004). Allowing Article III courts to construct a fictional observer whose "perceptions" are then dispositive of whether the government has an interest in censoring speech permits judicially engineered, phantom hecklers who may veto religious speech at any time. *See, e.g.*, *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992). As was true there, the reasonable observer test "presents a new threat to religious speech in the concept of the 'Ignoramus's Veto.'" *Id.*

> The Ignoramus's Veto lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine. The plaintiffs posit a "reasonable observer" who knows nothing about the nature of the exhibit—he simply sees the religious object in a prominent public place and ignorantly assumes that the government is endorsing it. *We refuse to rest important constitutional doctrines on such unrealistic legal fictions*.

Id. (emphasis added).

Indeed, in *Good News Club*, this Court noted that it would not graft a modified Heckler's veto into Establishment Clause jurisprudence for minor children observers. 533 U.S. at 119 ("We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."). Understandably, this Court did not want to employ it for what children might perceive when seeing a religious club taking place on government property. But, the concern is equally applicable to all judicially constructed "reasonable observers." The reasonable observer test itself (in any context) is nothing more than judicially sanctioned heckler's veto based on a phantom "observer" like the Ninth Circuit created here and which any court can construct to reverse engineer an Establishment Clause problem where none exists.

Although the record in this case demonstrates that the District and others knew Coach Kennedy was praying quietly to himself on the field after the game, the Ninth Circuit held that "an objective observer could reach *no other conclusion* than that [the District] endorsed Kennedy's religious activity by not stopping the practice." *Kennedy*, 991 F.3d 1018 (emphasis original). Thus, the Ninth Circuit constructed a phantom observer who would ignore the fact that Coach Kennedy "began praying alone on the fifty-yard line at the conclusion of each game,

id., and demonstrated that "all he wants is to pray alone." *Id.* at 1019. And, that phantom observer who apparently can reach no other conclusion than that an Establishment Clause violation lurks behind every corner became dispositive of whether private, religious speech by a government employee can be censored. This is little more than a heckler's veto judicially grafted onto Establishment Clause jurisprudence. The continued use of the reasonable observer standard in Establishment Clause cases invites content and viewpoint-based decisions by government officials, which then lead to censorship of protected speech. It also makes exercise of cherished First Amendment rights subject to the perception of the government decision-maker. In short, the reasonable observer test has always been and remains unprincipled in its formulation and too easily permits "*post hoc* rationalizations [and] the use of shifting or illegitimate criteria." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988). This Court should put an end to that.

For example, let's assume there is another coach who made no statements describing his activity but who walked to the fifty-yard line at the conclusion of every game and remained there silently for five minutes. Sometimes he would look up to the sky, sometimes he would bow his head, sometimes he would take a knee, and other times he would just look out at the dispersing crowd. Could a school district prohibit his activity because the government decision maker was confused that someone might perceive it as religious and then

might perceive the district as endorsing that religious speech?

In *Matal v. Tam*, 137 S. Ct. 1744 (2019), this Court raised concerns over censorship of speech when some find the speech offensive based on the perception of those receiving or observing the speech. *Matal* involved the question of whether trademarks were governmental or private speech and, if they were private speech, whether they could be censored based on their perceived offensiveness. This Court reaffirmed its longstanding jurisprudence that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." 137 S. Ct. at 1763. The government cannot escape a claim of viewpoint discrimination by justifying the censorship based on the actual or perceived reaction of the speaker's audience. *Id.* at 1767 (Kennedy, J., concurring). "Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message." *Id.* The reasonable observer test merely attributes the constitutionally impermissible government disapproval of the message to the engineered objections of the phantom observer and creates a purported Establishment Clause justification for otherwise impermissible censorship.

B. To The Extent This Court Maintains The Reasonable Observer Test, Coach Kennedy's Prayer Satisfies It.

To the extent the reasonable observer test continues to be used and the Court continues to permit government entities to raise the Establishment Clause as a compelling justification to free speech and free exercise of religion claims, government censorship will effectively trump the First Amendment guarantees.

As here, it is illogical for the reasonable observer to believe the District was endorsing religion by permitting Coach Kennedy to silently pray on the field after the game. He did not lead a group in prayer during the game; he did not say a prayer over the intercom; and he did not compel team members to join him in prayer. Rather, as a private individual who happened to be the coach, he went to the fifty-yard line to quietly say a prayer of thankfulness. Indeed, as even the Ninth Circuit recognized, Coach Kennedy began his practice by "praying alone on the fifty-yard line at the conclusion of each game." 991 F.3d at 1018. As discussed *supra*, because the District would have permitted him to engage in other speech on the field, singling out religious expressive speech for censorship should inform the reasonable observer that government is demonstrating hostility toward religion – not neutrality.

That reasonable observer should also be aware of Coach Kennedy's widely publicized media statements that he "vow[ed] to pray after game despite district order," making very clear the District did not endorse the conduct. *Id.* at 1012, 1018. Despite these facts, the Ninth Circuit held that "an objective observer could reach *no other conclusion* than that BSD endorsed Kennedy's religious activity by not stopping the practice." *Id.*

Not only does this case demonstrate that the hypothetical observer is not reasonable, he also is either ill-informed or antagonistic to religious speech (*i.e.*, a First Amendment heckler). In fact, during arguments this term in *Shurtleff v. City of Boston*, No. 20-1800, several Justices characterized the reasonable observer as a "fiction" who was "not informed," knowing only what he sees when he walks by the flagpole. *See Oral Arg. Tr.* at 18, 20-21, 30, 35, and 59. Assuming that the hypothetical reasonable observer is ill-informed rather than overtly hostile to First Amendment freedoms, he needs a history lesson.

In *Van Orden v. Perry*, Justice Scalia wrote in his concurring opinion that he would prefer the Court adopt a historically accurate Establishment Clause jurisprudence, "the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments." 545 U.S. 677, 692 (2005) (Scalia, J., concurring).

For example, the First Lady, Jill Biden, tweeted a religious message on Valentine's Day demonstrating the type of permissible public acknowledgment of God. She stated, "'Three things shall last forever – faith, hope, and love – and the greatest of these is love.' 1 Corinthians 13:13 From our family to yours: Happy Valentine's Day!" *See* https://twitter.com/FLOTUS/status/1493235950398451721?ref_src=twsrc%5Etfw.

As the above-image demonstrates, the tweet included a photo of a large heart on the White House lawn (*i.e.*, government property) bearing the same quote, without citation to 1 Corinthians 13:13. Would the phantom observer now have an

Establishment Clause claim against the White House because the First Lady chose to celebrate a holiday by reference to a Scripture verse on government property? Surely not, yet under the Ninth Circuit's formulation of the reasonable observer test, that is precisely what results.

The reasonable observer should understand that there is nothing unconstitutional about government itself generally honoring God and certainly not when government respects its employees' right to engage in private religious expression. The reasonable observer, however, historically has been one who sees public, religious expressions as government endorsements rather than government neutrality. *Cf. Shurtleff v. City of Boston*, 986 F.3d 78, 89-90 (1st Cir. 2021) (according to the First Circuit, the reasonable observer did not take into account the history of the access to the flagpole but just considered what the observer saw as he walked by the flagpole located on government property).

Given the two-fold issues with the observer – (i) reliance on government to properly perceive speech as religious and then to properly perceive what the reasonable observer would believe about the message sent when government permits the private expression and (ii) an observer who focuses more on whether the government is favoring religion than whether it is demonstrating hostility toward religion – the test should be removed from the Establishment Clause analysis. It is a dangerous

fiction that far too often results in First Amendment violations.

Justice Thomas has highlighted some of these same concerns with the reasonable observer. Justice Thomas explained in *Van Orden* that the Court "looks for the meaning to an observer of indeterminate religious affiliation who knows all the facts and circumstances surrounding a challenged display." 545 U.S. at 696 (Thomas, J., concurring). In determining the view of "this unusually informed observer," this Court inquires whether the sign or display "'sends the ancillary message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.*

The test is not fully satisfying to either "nonadherents or adherents." *Id.* "For the nonadherent, who may well be more sensitive than the hypothetical 'reasonable observer,' or who may not know all the facts, this test fails to capture completely the honest and deeply felt offense he takes from the government conduct." *Id.* at 696-97. In contrast, "[f]or the adherent, this analysis takes no account of the message sent by removal of the sign or display, which may well appear to him to be an act hostile to his religious faith. The Court's foray into religious meaning either gives insufficient weight to the views of nonadherents and adherents alike, or it provides no principled way to choose between those views." *Id.* at 697. The "Court's effort

to assess religious meaning is fraught with futility." *Id.* at 696-97.

The Ninth Circuit opinion exemplifies the failure to give sufficient weight to the views of those who perceive the District's actions as hostility toward religion. Indeed, the opinion "weaponizes the Establishment Clause to defeat the Free Exercise claim of one man who prayed 'as a private citizen.'" *Kennedy*, 4 F.4th at 931 (O'Scannlain, J., opinion) (quoting *Kennedy*, 991 F.3d at 1016)). The "opinion 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, 4 F.4th at 939 (O'Scannlain, J., opinion).

CONCLUSION

This Court should reverse the Ninth Circuit and affirm that teachers do not shed their constitutional rights at the schoolhouse gate.

Dated: March 1, 2022

Respectfully submitted,

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