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 FORMER ATTORNEYS GENERAL EDWIN MEESE II, WILLIAM P. BARR, ALBERTO R. GONZALES, MICHAEL B. MUKASEY, AND JEFFERSON B. SESSIONS III AND FORMER ACTING ATTORNEY GENERAL MATTHEW WHITAKER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[*]

Amici are former Attorneys General of the United States and a former Acting Attorney General of the United States.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

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[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus curiae* briefs. *See* Sup. Ct. R. 37.3.

2009. He also was a judge on the United States District Court for the Southern District of New York from 1987 to 2006.

The Honorable Jefferson B. Sessions III served as Attorney General of the United States from 2017 to 2018. He was also a United States Senator from Alabama from 1997 to 2017, Attorney General of Alabama from 1995 to 1997, and United States Attorney for the Southern District of Alabama from 1981 to 1993.

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As Attorney General, *amici* served as the chief law enforcement officer of the federal government, giving them a unique perspective on how government power can be misused to imperil the free exercise rights of citizens. *Amici* believe that the First Amendment provides critical protections to all Americans, including public employees, and believe that the decision below grossly misinterprets the Establishment Clause in a manner that impinges on the religious freedom of all Americans.

SUMMARY OF ARGUMENT

The Ninth Circuit came to the erroneous conclusion that Coach Kennedy's brief prayers following each football game essentially established a state religion. But the Establishment Clause, properly understood through historical practice, cannot be violated absent legal compulsion. Nor does the Clause demand strict government neutrality towards reli-

gion. Thus, the Establishment Clause has never historically operated to silence prayerful public employees. Instead, prayer in the public sphere—and even in public schools—was historically commonplace.

To come to a contrary result, the Ninth Circuit had to expand the meaning of the Establishment Clause by ignoring historical practice. The gateway for this boundless expansion is *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Lemon* and its progeny embraced a strict-separationist theory of the Establishment Clause based on a confluence of religious animus and Thomas Jefferson's misleading "wall of separation" metaphor. Although this Court has soured on *Lemon* in favor of a historical approach, the principles animating *Lemon* endure in its progeny. This Court should expressly reject *Lemon* along with the ahistorical principles that animate it.

Lemon's deviation from historical practice provides reason enough to reject it. But the effect of that deviation has proved particularly pernicious: Federal and state governments have begun weaponizing the Establishment Clause to suppress employees' free exercise rights. Specifically, the strict-separationist ideology has spawned a secular establishment, which requires active suppression of religious expression. Further, the narrow-minded focus on effects in *Lemon* and its progeny arms governmental entities with a heckler's veto, allowing them to suppress religious expression they disfavor.

The Americans who drafted and ratified the First Amendment would balk at the notion that the Establishment Clause could be co-opted to cancel a coach for his private prayers. So should this Court.

ARGUMENT

I. The Establishment Clause Must Be Interpreted Consistent With Its History And Tradition.

"Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I.

In interpreting that clause, the Ninth Circuit made much of "the history" of Coach Kennedy's prayers, but it neglected to consider—even once—the history of religious expression in the United States. *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1017 (9th Cir. 2021) ("*Kennedy III*"). That was plainly an error. This Court's "interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *accord Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history . . . ."). "A test that would sweep away what has so long been settled" is precisely what "the Establishment Clause seeks to prevent." *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014).

With tradition and historical practice properly guiding the search on how to apply the Establishment Clause, it is clear that the Establishment Clause (A) requires compulsion to violate it and (B) does not demand strict neutrality towards religion. Unsurprisingly, then, there is a long tradition in the United States of prayer in public institutions, including public schools.

A. Compulsion Is Required To Violate The Establishment Clause.

The Establishment Clause prohibits legal compulsion of religious adherence—not the mere presence of religion in the public sphere.

When the Establishment Clause became law, "virtually every American . . . knew from experience what those words meant." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2107 (2003) [hereinafter McConnell, *Establishment*]. In England and the American colonies, governments put their imprimatur on particular churches and mandated support for those churches "*by force of law and threat of penalty*." *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting); *accord* 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1870–1871, pp. 727–28 (1833) ("[T]he duty of supporting religion . . . is very different from the right to *force* the consciences of other men, or to *punish* them for worshipping God in the manner, which, they believe, their accountability to him requires." (emphases added)).

In England, Parliament established the Church of England as "the sole institution for lawful public worship" and "punished dissenters for engaging in prohibited religious worship." McConnell, *Establishment*, *supra*, at 2113–14. Legislation excluded dissenters from civil, military, and academic offices. *Id.* at 2113. So rooted was the English establishment in the minds of the American public that the earliest American dictionary defined "establishment" by reference to "[t]he

episcopal form of religion, so called, in England." *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (alteration in original; quotation marks and citation omitted).

In America, Anglican establishments generally typified southern colonies and Puritan or Congregationalist establishments generally pervaded New England. McConnell, *Establishment*, *supra*, at 2115. New England colonies compelled residents to support and, in some cases, attend the established church, while "banishing or punishing dissenters." *Id.* at 2123–24. Virginia mandated Sabbath observance and licensed ministers; violators were "horsewhipped and jailed." *Id.* at 2118–19. Maryland outlawed Catholic worship in public and proselytization. *Id.* at 2129. Georgia excluded Catholics altogether. *Id.* In short, many of the colonial establishments "compelled religious observance . . . and imposed sanctions for the public exercise of religion outside of the established church." *Id.* at 2119; *accord Weisman*, 505 U.S. at 640–41 (Scalia, J., dissenting) ("[A]ttendance at the state church was required . . . and dissenters, if tolerated, faced an array of civil disabilities.").

Given these widespread practices, the Founding Fathers expressly identified the fundamental function of legal compulsion in the establishments they forbade. James Madison interpreted the Establishment Clause as prohibiting Congress from "enforc[ing] the legal observation of [religion] by law." *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 136 (7th Cir. 1987) (Easterbrook, J., dissenting) (citation omitted). Madison and Thomas Jefferson both authored contemporaneous Virginia legislation prohibiting estab-

lishments that "compelled" attendance at an established church, *id.* at 135 (citation omitted), or enforced such mandates "by force or violence," McConnell, *Establishment*, *supra*, at 2120 (citation omitted).

The point to these historical reminiscences is not to argue that this Nation should return to a system of state-sponsored religion but to illustrate the traditional limitations of the Establishment Clause's reach. Historical context shows that the Establishment Clause "forestalls *compulsion by law* of the acceptance of any creed or the practice of any form of worship." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (emphasis added).

B. The Establishment Clause Does Not Demand Strict Neutrality Towards Religion.

While legal compulsion is prohibited by the Establishment Clause, the Clause does not demand strict governmental neutrality towards religion. To the contrary, it has always been understood that religion has a place in American civic society. When the Establishment Clause became law, "the general if not the universal sentiment in America was[] that Christianity ought to receive encouragement from the State." 3 Story, *supra*, § 1868, p. 726. "An attempt to level all religions . . . would have created universal disapprobation . . . ." *Id.* Likewise, the members of Congress who debated the Establishment Clause never intimated that it "would require that the Government be absolutely neutral as between religion and irreligion." *Jaffree*, 472 U.S. at 99 (Rehnquist, J., dissenting).

Unsurprisingly, then, contemporaneous legislation did not evince strict neutrality towards religion.

The Northwest Ordinance—which Congress considered on the same day Madison introduced the Bill of Rights—extolled religion as "necessary to good government and the happiness of mankind." *Id.* at 100 (Rehnquist, J., dissenting) (quotation marks and citation omitted). In the very Virginia law that denounced established religions, Jefferson exalted "Almighty God," "Lord both of body and mind." *Am. Jewish Cong.*, 827 F.2d at 135–36 (Easterbrook, J., dissenting) (quotation marks omitted). At Congress's behest, President Washington issued a Thanksgiving Proclamation, devoting November 26 to "the beneficent author of all the good that was, that is, or that will be." *Jaffree*, 472 U.S. at 101–02 (Rehnquist, J., dissenting). In short, absolute devotion to neutrality is "inconsistent with our national traditions." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring).

Furthermore, not only does strict neutrality lack historical grounding, but it affirmatively runs afoul of the First Amendment. Although the Establishment and Free Exercise Clauses were meant to complement one another in pursuit of the Founders' goal "to secure religious liberty," *Jaffree*, 472 U.S. at 68, strict neutrality places the two in conflict. The Free Exercise Clause *prohibits* governmental discrimination against religion, but strict neutrality *requires* governmental discrimination against religion to avoid even the appearance of "aid[ing] or advanc[ing] religion." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 117–18 (1992) [hereinafter McConnell, *Religious*]; *see, e.g.*, *Kennedy III*, 991 F.3d

at 1020 (concluding that the school district was required to punish Coach Kennedy's prayers to "avoid[] a violation of the Establishment Clause").

The upshot is that "untutored devotion to the concept of neutrality can lead to . . . active[] hostility to the religious." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring). But interpreting one clause of the First Amendment to undermine its corollary injects conflict into what was traditionally and historically a cohesive defense of individuals' religious exercises. Consequently, there cannot be a constitutional requirement "that the government show a callous indifference to religious groups." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *see also Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) ("[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious."). Such a "brooding and pervasive devotion to the secular" violates the First Amendment. *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

In sum, "[a]s its history abundantly shows, . . . nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion." *Jaffree*, 472 U.S. at 113 (Rehnquist, J., dissenting). Instead, "[w]hen the state encourages religious instruction or cooperates with religious authorities . . . , it follows the best of our traditions." *Zorach*, 343 U.S. at 313–14.

C. Our Nation's Traditions Confirm This Understanding Of The Establishment Clause.

With tradition and historical practice properly guiding the interpretation of the Establishment

Clause, it is clear that the Clause (A) requires compulsion for a violation and (B) does not demand strict neutrality towards religion. Unsurprisingly, then, our nation's history and traditions confirm that non-compulsory religious expression in the public sphere is consistent with the Establishment Clause. Religious expression—indeed, prayer—in the public sphere has endured in the legislative,[1] executive,[2] and judicial[3] branches.

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[1] *See, e.g.*, *Galloway*, 572 U.S. at 576 ("That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society."); *Jaffree*, 472 U.S. at 84–85 (Burger, C.J., dissenting) ("[T]he House of Representatives and the Senate regularly open each session with a prayer. These legislative prayers are not just one minute in duration, but are extended, thoughtful invocations and prayers for Divine guidance."); *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) ("From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.").

[2] *See, e.g.*, *Jaffree*, 472 U.S. at 113 (Rehnquist, J., dissenting) ("George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of 'public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.'"); *Engel v. Vitale*, 370 U.S. 421, 448 (1962) (Stewart, J., dissenting) ("Each of our Presidents, from George Washington to John F. Kennedy, has upon assuming his Office asked the protection and help of God."); *Weisman*, 505 U.S. at 634 (Scalia, J., dissenting) ("President Bush, continuing the tradition established by President Washington, asked those attending his inauguration to bow their heads, and made a prayer his first official act as President.").

[3] *See, e.g.*, *Chambers*, 463 U.S. at 786 ("In the very courtrooms in which the United States District Judge and later three Circuit

So too with educational institutions. Religious expression has pervaded schools since the founding and public schools since their inception. In the colonies, teachers were predominantly ministers, and religion permeated curricula. McConnell, *Establishment*, *supra*, at 2171. For instance, clergy generally controlled schools or licensed teachers in Massachusetts, New Hampshire, Connecticut, and New York. *Id.* at 2172–73. In the middle and southern colonies, "the roles of preacher and schoolmaster were often one and the same." *Id.* at 2173. School prayers were also uncontroversial. Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing* Engel, 67 Stan. L. Rev. 479, 486 (2015).

Those practices continued even after the Establishment Clause's enactment. McConnell, *Establishment*, *supra*, at 2173. Rather than turning a blind eye to those practices, the First Congress justified legislation funding schools on the ground that "[r]eligion . . . [is] necessary to good government and the happiness of mankind." *Jaffree*, 472 U.S. at 100 (Rehnquist, J., dissenting) (quotation marks and citation omitted).

Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court.'"); *Weisman*, 505 U.S. at 635 (Scalia, J., dissenting) ("And this Court's own sessions have opened with the invocation 'God save the United States and this Honorable Court' since the days of Chief Justice Marshall."); *Am. Jewish Cong.*, 827 F.2d at 133 (Easterbrook, J., dissenting) ("[W]itnesses in our courts take oaths on the Bible . . . ."); *Freedom From Religion Found., Inc. v. Mack*, 4 F.4th 306, 314 (5th Cir. 2021) ("When riding circuit, our Nation's first Chief Justice, John Jay, authorized clergymen to open court sessions with prayer.").

When public schools emerged in the nineteenth century, religion remained in schools. The state-run University of Virginia required students "to attend religious worship at the establishment of their respective sects." *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 246 (1948) (Reed, J., dissenting) (quotation marks and citation omitted). Clergy acted as superintendents in many states. McConnell, *Establishment*, *supra*, at 2174. During Reconstruction, Congress funded new public schools in the South, which Protestant missionaries operated. *Id.* By 1890, the Establishment Clause "was generally thought not to apply to . . . school prayer." Lain, *supra*, at 489. For instance, even when Horace Mann, the "founder of our public school system," reduced the role of religion in public schools to avoid sectarian infighting, school prayer remained constant. *Id.* at 487. Likewise, the first public high school graduation ceremony in 1868 involved "long prayers." *Weisman*, 505 U.S. at 635 (Scalia, J., dissenting) (quotation marks and citation omitted).

In sum, religious expression in public schools reflects "the spiritual heritage of our Nation." *Engel*, 370 U.S. at 445 (Stewart, J., dissenting). And the Establishment Clause, properly understood through historical practice, does not proscribe prayer in public schools. *Jaffree*, 472 U.S. at 113–14 (Rehnquist, J., dissenting).

II. The Decision Below Strays From This Understanding Of The Establishment Clause.

The Ninth Circuit nevertheless concluded that Bremerton School District had to suppress Coach Kennedy's prayers to avoid an Establishment Clause

violation. The very fact that the school district feared an Establishment Clause violation—which the Ninth Circuit acknowledged was "the 'sole reason' [the school district] limited Kennedy's public actions as it did"—illustrates the gulf between the Clause's original understanding, described in Section I, *supra*, and the caselaw spawned by *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Kennedy III*, 991 F.3d at 1010.

The Establishment Clause—once understood to be a means of preventing the federal government from overriding states' religious preferences and an individual's conscience by force or finance—was here weaponized by a local school board to prevent an assistant coach from taking a brief, solitary moment of communion with his Maker. Worse still, the Ninth Circuit validated the school district's concerns by pointing to the multiplicity of lawsuits against public schools "in federal district courts across the country for alleged Establishment Clause violations" since 2007. *Kennedy III*, 991 F.3d at 1020 n.4. But such evidence of the Clause's weaponization should increase a court's consternation, not assuage it.

Writing in dissent from the denial of rehearing en banc, Judge Nelson correctly observed that the panel relied on *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), to reach its conclusion regarding the Establishment Clause and that *Santa Fe* in turn relies on a test that "stems from *Lemon*'s atextual and ahistorical purpose and effects prongs." *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 947 (9th Cir. 2021) (Nelson, J., dissenting from the denial of rehearing).

Lemon, however, is a fatally flawed decision that should have no place in Establishment Clause jurisprudence. The Ninth Circuit's reliance on caselaw stemming from *Lemon* is yet another reason why the decision below should be reversed.

A. *Lemon*'s Strict-Separationist View Of The Establishment Clause Is Derived From Jefferson's Ahistorical "Wall Of Separation" Metaphor And Is Grounded In Anti-Religious Bigotry.

The judiciary's departure from well-settled constitutional interpretation principles with respect to the Establishment Clause can be traced to this Court's decision in *Everson v. Board of Education of Ewing*, which installed "neutrality" as the new lodestar of post-incorporation Establishment Clause jurisprudence. 330 U.S. 1, 15–18 (1947) ("That Amendment requires the state to be a [*sic*] neutral in its relations with groups of religious believers and non-believers . . . ."). The *Everson* Court summarized its newly chartered course "[i]n the words of Jefferson": The Establishment Clause "was intended to erect 'a wall of separation between Church and State.'" *Id.* at 16. Many of the decisions following *Everson* were "hopelessly divided pluralities" that conceded "with embarrassing candor . . . that the 'wall of separation' is merely a 'blurred, indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.'" *Jaffree*, 472 U.S. at 107 (Rehnquist, J., dissenting) (citations omitted).

Enter *Lemon* itself. Attempting to weave a tapestry out of these disparate threads, the Court's infa-

mous test in *Lemon* focused on the (1) purpose, (2) effects, and (3) degree of government entanglement associated with the action in question. *Lemon*, 403 U.S. at 612. But the test's ultimate aim was to "prohibit governmental practices that have the effect of endorsing religion." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2265 (2020) (Thomas, J., concurring) (citing *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)); *see also Santa Fe*, 530 U.S. at 302 (recognizing that the Establishment Clause forbids "government speech endorsing religion" (emphasis omitted)).

To begin, noticeably absent from *Lemon* was any semblance of the legal compulsion historically required to violate the Establishment Clause. In *Engel*, this Court held that the Establishment Clause "does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." 370 U.S. at 430; *but see Am. Jewish Cong.*, 827 F.2d at 137 (Easterbrook, J., dissenting) (criticizing the circular logic that there can be an establishment without compulsion). The concern over "the indirect coercive pressure" from government endorsement of religion, *Engel*, 370 U.S. at 431, led the Court to invent the "boundless, and boundlessly manipulable, test of psychological coercion," *Weisman*, 505 U.S. at 632 (Scalia, J., concurring), so that the Court has held that "[t]he Establishment Clause, at the very least, prohibits government from *appearing* to take a position on questions of religious belief," *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989) (emphasis added).

Worse still, *Lemon* arose from *Everson*'s fundamental misperception that the Establishment Clause codified Jefferson's metaphorical "Wall of Separation." In fact, as has been thoroughly documented, the metaphor itself has no place in constitutional interpretation. *Jaffree*, 472 U.S. at 110 (Rehnquist, J., dissenting) ("[T]he *Lemon* test has no more grounding in the history of the First Amendment than does [Jefferson's] wall theory upon which it rests."); *id.* at 107 ("The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned."); *Engel*, 370 U.S. at 445–46 (Stewart, J., dissenting) ("Moreover, I think that the Court's task, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution.").

Moreover, *Lemon*'s strict-separationist view of the Establishment Clause is grounded in the very anti-religious bigotry that the First Amendment was enacted to prevent. *See, e.g.*, *Espinoza*, 140 S. Ct. at 2266 (Thomas, J., concurring) ("Historical evidence suggests that many advocates for this separationist view were originally motivated by hostility toward certain disfavored religions."); *id.* ("[*Everson*'s author] Justice Black, well known for his role in formulating the Court's modern Establishment Clause jurisprudence, once described Catholic petitioners as 'powerful sectarian religious propagandists' 'looking toward complete domination and supremacy' of their 'preferences and prejudices.'"); *Kennedy*, 4 F.4th at 952 (Nelson, J., dissenting from the denial of rehearing) ("[R]eligious

infighting laid the groundwork for the Supreme Court's separationist jurisprudence (like *Lemon*).").

Furthering the effects of this animus, *Lemon* acted to "remove[] the entire subject of religion from the realm of permissible governmental activity," *Espinoza*, 140 S. Ct. at 2266 (Thomas, J., concurring), thereby enabling the "Court's tendency to press relentlessly in the direction of a more secular society," McConnell, *Religious*, *supra*, at 120; *see also Espinoza*, 140 S. Ct. at 2266 (Thomas, J., concurring) ("The content-based restriction imposed by this Court's Establishment Clause jurisprudence . . . communicates a message that religion is dangerous and in need of policing, which in turn has the effect of tilting society in favor of devaluing religion.").

B. *Lemon* Is Already Regularly Ignored By This Court, Because *Lemon* Ignores Traditional Tests For Constitutional Interpretation.

Conspicuously absent from *Lemon*'s analysis is any reference to history, text, or tradition. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080–82 (2019) (plurality) (describing *Lemon*'s inability to account for historical or traditional practices). Yet this trio of tools is indispensable for the courts' task of faithful constitutional interpretation. *Cnty. of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part) ("[T]he meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings.").

Indeed, despite *Lemon*'s attempt to excise history and tradition from the Establishment Clause analy-

sis, courts have acknowledged that ignoring our Nation's past practices amounted to abandoning the best—sometimes only—means of deriving the Establishment Clause's true meaning. *See, e.g.*, *Galloway*, 572 U.S. at 584 (ignoring *Lemon* because non-sectarian prayers did "not fall outside the tradition this Court has recognized"); *Chambers*, 463 U.S. at 792 (recognizing that Establishment Clause tests are unnecessary where "unambiguous and unbroken history" shows a particular practice is "part of the fabric of our society").

Lemon must ignore history, text, and tradition, because to do otherwise would be to indict itself. After all, strict neutrality, as contemplated by *Lemon*, is incompatible with the history and traditions of this Nation. The Court's recent jurisprudence simply ignoring *Lemon* illustrates this truth.[4] Indeed, even with the same breath the Court decreed "[n]eutrality is

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[4] *See, e.g.*, *Am. Legion*, 139 S. Ct. at 2087 (plurality) ("While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."); *Galloway*, 572 U.S. at 577 ("The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures."); *Van Orden*, 545 U.S. at 686 ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history."); *Chambers*, 463 U.S. at 791 ("This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.").

what is required," it has acknowledged that "that principle is more easily stated than applied." *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976). It is unsurprising, then, that "the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting).

C. *Lemon*'s Strict-Separationist Interpretation Of The Establishment Clause Should Be Rejected.

Over the last four decades, this Court has become increasingly critical of *Lemon* and its progeny. *See, e.g.*, *Santa Fe*, 530 U.S. at 319 (Rehnquist, C.J., dissenting) ("*Lemon* has had a checkered career in the decisional law of this Court." (collecting cases)); *McCreary*, 545 U.S. at 890 (Scalia, J., dissenting) ("[A] majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the brain-spun '*Lemon* test' that embodies the supposed principle of neutrality between religion and irreligion." (collecting cases)).

More recently, in *American Legion*, Justice Alito criticized *Lemon* in his plurality opinion for its "shortcomings," particularly its failure to account for historical practice. 139 S. Ct. at 2080–82 (plurality) (citing a non-exhaustive list of eleven cases in which this Court "either expressly declined" to apply or "simply ignored" the *Lemon* test). The Court replicated this pattern in *Espinoza* by failing to cite *Lemon* even a single time in the majority opinion. *See generally Espinoza*, 140 S. Ct. 2246. By now *Lemon*'s demise is

undeniable: All that remains is for the Court to formally overrule this "misadventure." *Am. Legion*, 139 S. Ct. at 2101 (Gorsuch, J., concurring).

But formally overruling *Lemon* will not on its own solve the problems that have plagued modern Establishment Clause jurisprudence and driven the criticisms of *Lemon*. Rather, it is important to reject the principles that led the Court to issue *Lemon* in the first place.

Lemon was nothing more than a Sisyphean attempt "to distill from the Court's existing caselaw a test that would bring order and predictability to Establishment Clause decisionmaking." *Id.* at 2080 (plurality). It is no secret that *Lemon* was meant to "embod[y] the supposed principle of neutrality between religion and irreligion." *McCreary*, 545 U.S. at 890 (Scalia, J., dissenting).[5] And as long as the Court remains committed to the "'high and impregnable' wall between church and state," *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (quoting *Everson*, 330 U.S. at 18), the principles animating *Lemon*, along with its problems and progeny, will remain alive and well.

This Court need look no further than the Ninth Circuit panel opinion, which contains no citation to *Lemon* itself, for proof that *Lemon*'s ideals and effects will reach beyond the grave. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398

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[5] Indeed, the Ninth Circuit panel here cited *McCreary*'s majority to argue that the Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary*, 545 U.S. at 860 (quotation marks and citation omitted); *see also Kennedy III*, 991 F.3d at 1017.

(1993) (Scalia, J., concurring) (analogizing *Lemon* to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried").

It is the strict-separationist principle behind *Lemon*, wholly unmoored from a proper interpretation of the Establishment Clause, that must be rejected. "A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause." *Cnty. of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part).

III. The Establishment Clause Can Be Misinterpreted And Weaponized To Inhibit The Free Exercise Of Religion, Which Is Precisely What Happened Here.

The Ninth Circuit's opinion illustrates how governments—when armed with *Lemon*'s strict-separationist principle—can weaponize an interpretation of the Establishment Clause that has been unmoored from history and tradition to squelch free expression. Specifically, governments trammel free exercise rights by (A) creating a secular establishment and (B) sheltering offended observers.

A. Creation Of A Secular Establishment Suppresses Free Expression.

Under *Lemon*'s strict-separationist approach, governmental actions cannot appear to have some beneficial connection to religion or a religious institution. 403 U.S. at 612; *see also Kennedy III*, 991 F.3d at 1017. But a plethora of otherwise-secular actions could run

afoul of such a rule. *See* McConnell, *Religious*, *supra*, at 129 (recognizing that a government's benign accommodation for a religious practice could "advance" religion). In such cases, a strict-separationist doctrine demands "discrimination against religion." *Id.*; *accord Schempp*, 374 U.S. at 306 (Goldberg, J., concurring) ("[U]ntutored devotion to the concept of neutrality can lead to . . . active[] hostility to the religious.").

In a sense, such discrimination spawns an establishment of its own—a secular establishment. Indeed, when the government "affirmatively oppos[es]" religion, it is essentially establishing a "religion of secularism" by "preferring those who believe in no religion over those who do believe." *Schempp,* 374 U.S. at 225 (quotation marks and citation omitted); *accord* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195, 198 (1992) (recognizing the "establishment of the secular public moral order"). In short, strict neutrality's "brooding and pervasive devotion to the secular," *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring), has the effect of "prostrating" religion before a secular establishment, 3 Story, *supra*, § 1871, p. 728.

And that is when fundamental free exercise rights begin to suffer: Although the Establishment and Free Exercise Clauses should work in concert "to secure religious liberty," *Jaffree*, 472 U.S. at 68, a secular establishment renders the two clauses "at war with" one another, *McCollum*, 333 U.S. at 211–12. For instance, the Free Exercise Clause *prohibits* governmental discrimination against religion, but the Establishment Clause—infected with a strict-neutrality ideology—*requires* governmental discrimination against religion to avoid the appearance of advancing religion.

McConnell, *Religious*, *supra*, at 117–18. In short, under the secular establishment, "[f]reedom of worship . . . is outweighed by virtually any secular interest." *Id.* at 126.

Although this Court has rightfully rejected this type of discrimination against religion in other contexts, *see, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) ("[D]enying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion."), it is alive and well in cases like Coach Kennedy's: The Ninth Circuit began by adopting *Lemon*'s strict-separationist approach, which required that the school district's actions not appear to have the effect of advancing religion. *Kennedy III*, 991 F.3d at 1017 (asking "whether an objective observer . . . would view BSD's allowance of that activity as 'stamped with [the] school's seal of approval'" (citation omitted)). Next, to avoid the appearance of advancing religion, the school district had to suppress Coach Kennedy's religious expression. *Id.* at 1018 (concluding that the school district could not continue to employ Coach Kennedy in order to avoid the appearance that it "endorsed Kennedy's religious activity by not stopping the practice"). Finally, Coach Kennedy could only retain his position by adopting the language approved by the secular establishment in place of his own religious expression. *Id.* at 1011 (recognizing that Coach Kennedy could continue to give inspirational speeches, so long as they "remain entirely secular in nature").

In sum, the strict-separationist ideology favors the secular over the non-secular, leading to a secular

establishment. This Court should return to the historical understanding of the Establishment Clause and recognize that strict separation finds no home in the First Amendment.

B. "Offended Observers" Can Wield A Heckler's Veto To Squelch Free Exercise Rights.

This Court has repeatedly resisted granting offended observers a heckler's veto over religious expression they disfavor. *See, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) ("The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion."); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) ("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.").

Regardless, governments have weaponized the Establishment Clause into a heckler's veto in the following manner: In place of legal compulsion, *Lemon* and its progeny substituted a single-minded focus on *effects*—the effect of religious expression on an objective observer and the coercive effect of the expression. *Kennedy III*, 991 F.3d at 1017–18. At a historical level, *Lemon* severely eroded the legal-compulsion standard. But at a practical level, by narrow-mindedly focusing on the effects religious expression might have *on offended parties*, governments can ignore the impact of suppressing religious expression *on free exercise rights*. *See Widmar v. Vincent*, 454 U.S. 263,

270–71 (1981) (recognizing that avoidance of an Establishment Clause violation can serve as a "compelling interest" that trumps free exercise rights).

And that is precisely what happened here: The Ninth Circuit, inspired by *Lemon* and its progeny, focused primarily on the *effects* of Coach Kennedy's actions on others—the effect on an objective observer and the coercive effect on students. *Kennedy III*, 991 F.3d at 1017–18. For instance, the panel made much of one student who allegedly joined Coach Kennedy's prayers "out of a fear that declining to do so would negatively impact his playing time." *Id.* at 1018; *see also id.* at 1024–25 (Christen, J., concurring). But aside from this one unsubstantiated and subjective concern, there is no evidence Coach Kennedy imposed a pray-to-play requirement on his team members.

By allowing the objections—hypothetical or otherwise—of an offended observer to trump free exercise rights, the objective-observer standard "arm[s] opponents of religious interests with an invincible weapon: their mere opposition [becomes] a basis for a finding of unconstitutionality." McConnell, *Religious*, *supra*, at 130. In short, the school district wielded a heckler's veto to cancel Coach Kennedy.

* * *

This case demonstrates precisely why an expansive view of the Establishment Clause—unmoored from its original meaning and historical practice—can be so pernicious. To begin, neither a parental complaint nor a threat of litigation precipitated this case: Instead, individuals within the school district itself decided to accuse one of their own employees of violating the Establishment Clause. And they did so only

because a staffer from a different school mentioned Coach Kennedy's prayers *seven years after* Coach Kennedy began his post-game prayers. *Kennedy*, 4 F.4th at 912 (Smith, J., concurring in the denial of rehearing). Thus, this case does not involve merely a vocal minority attempting to co-opt the Establishment Clause, but instead a school board perniciously weaponizing the Clause against its religious employee.

Coach Kennedy did nothing wrong—let alone unconstitutional. Outside of his regular job duties as a football coach, Coach Kennedy took time, after each game, to kneel and thank God. Because Coach Kennedy spoke in his capacity as a private citizen, the First Amendment protects his speech. *Kennedy*, 4 F.4th at 938 (O'Scannlain, J., statement respecting the denial of rehearing). Further, because a coach's personal prayer lacks legal force, Coach Kennedy did not establish a state religion by kneeling and honoring God. *Id.* at 952 (Nelson, J., dissenting from the denial of rehearing). Regardless, the school district sought to punish him. And the Ninth Circuit enthusiastically gave its assent, with some judges even chiding Coach Kennedy for "clearly flout[ing] the instructions found in the Sermon on the Mount on the appropriate way to pray." *Id.* at 926 (Smith, J., concurring in the denial of rehearing).

The solution is simple: This Court should restore the Establishment Clause to its original public meaning. Consistent with historical practice, legal compulsion is necessary to violate the Establishment Clause, and strict neutrality is foreign to the Clause. Because Coach Kennedy's conduct does not run afoul of that, Bremerton School District was unjustified in using

the Establishment Clause as an excuse to prevent him from exercising his religious beliefs.

CONCLUSION

For these reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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