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 GALEN BLACK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Steven T. Collis
Counsel of Record
Law & Religion Clinic
University of Texas
School of Law
727 E. Dean Keeton St.
Austin, TX 78705
512-475-9090
Steven.collis@law.utexas.edu

QUESTIONS PRESENTED

1. Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection.

2. Whether, assuming that such religious expression is private and protected by the Free Speech and Free Exercise Clauses, the Establishment Clause nevertheless compels public schools to prohibit it.

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iv

Interest of *Amicus* 1

Summary of Argument 3

Argument...10

I. The Court Should Adopt an Objective Coercion Test When Determining if Public Employee Religious Exercise Violates the Establishment Clause...12

II. The Objective Coercion Test Is Consistent with Principles of Religious Volunteerism 14

A. Allowing Public Employees to Exercise Their Religion Will Not Distort Religious Choices 14

B. Refusing to Allow Employee Religious Exercise Will Distort Religious Volunteerism...19

III. An Objective Coercion Test Is Consistent with an Original Understanding of the Religion Clauses.. 20

A. The Religion Clauses Share the Same Goal of Maximizing Religious Volunteerism ..21

B. The Religion Clauses Reflect a Value for Religious Pluralism that Stems from Religious Volunteerism 23

IV. An Objective Coercion Test Will Avoid Absurd Results, Is Manageable, and Will Not Affect Prior Precedent 26

A. An Objective Coercion Test Will Avoid Absurd Results 26
B. An Objective Coercion Test Is Administrable 28
C. An Objective Coercion Test in This Context Is Consistent with This Court's Prior Precedent.......................................30
Conclusion 32

TABLE OF AUTHORITIES

Cases **Page(s)**

Am. Legion v. Am. Humanist Ass'n,
139 S. Ct. 2067 (2019) 21

Bd. of Educ. v. Mergens,
496 U.S. 226 (1990) 11

Cty. of Allegheny v. ACLU,
492 U.S. 573 (1989) 26

Emp. Div. Dep't of Human Res. v. Smith ("*Smith I*"),
485 U.S. 660 (1988) 1, 2

Emp. Div. Dep't of Human Res. v. Smith ("*Smith II*"),
494 U.S. 872 (1990) 1, 2

Engel v. Vitale,
370 U.S. 421 (1962) 10–11

Everson v. Bd. of Educ.,
330 U.S. 1 (1947) 20

Garcetti v. Ceballos,
547 U.S. 410 (2006) 10

Kennedy v. Bremerton Sch. Dist.,
991 F.3d 1004 (9th Cir. 2021) 13, 26

Lee v. Weisman,
505 U.S. 577 (1992) 11, 17, 30, 31

Lemon v. Kurtzman,
403 U.S. 602 (1971) 11

Kennedy v. Bremerton Sch. Dist.,
142 S. Ct. 857 (2022) 10, 12

Rosenberger v. Rector & Visitors,
515 U.S. 819 (1995) 11

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) 11, 31

Sch. Dist. of Abington Twp. v. Schempp,
374 U.S. 203 (1963) 11, 20

Town of Greece v. Galloway,
572 U.S. 565 (2014) 13

Wisconsin v. Yoder,
406 U.S. 205 (1972) 19, 20

Statutes and Regulations

An Act Respecting the Laicity of the State, S.Q.
2019, c 12, s 6 (Can.) 27

An Act to foster adherence to State religious
neutrality and, in particular, to provide a
framework for requests for accommodations
on religious grounds in certain bodies,
S.Q. 2017, c 19 (Can.)..27

Charter of Human Rights and Freedoms, R.S.Q.,
c C-12 (Can) 27

National Council of Canadian Muslims (NCCM) c.
Attorney General of Québec, 2018 QCCS 2766
(Can.). 27

Or. Rev. Stat. § 475.752(4) (2020) 2

Constitutions

MASS. CONST. OF 1789, pt. I, arts. II–III 23

U.S. CONST. amend. I ....*passim*

U.S. CONST. art. VI...25

Other Authorities

1 ANNALS OF CONG. 949–502, *in* 2 DEBATE ON THE CONSTITUTION 267 (1993) 21

2 THE DEBATES OF THE SEVERAL STATE CONVENTIONS [ON] THE ADOPTION OF THE FEDERAL CONSTITUTION (Elliot 2d ed. 1836) 21–22

DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776-1833 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019) 22

Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373 (1992) 14

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990)................................15

Douglas Laycock, *Substantive Neutrality Revisited*, 110 W.VA. L. REV. 51 (2007) 14

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003) 22

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) 23

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992) 14–15, 22

Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989)....................................15

Letter from Joseph Spencer to James Madison (Feb. 28, 1788), *in* 2 DEBATE ON THE CONSTITUTION (1993) 21

Thomas Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693 (1997) 11, 14, 24

INTEREST OF *AMICUS*[1]

Galen Black was a co-plaintiff in *Employment Division v. Smith*, 494 U.S. 872 (1990) ("*Smith II*"). He is also a devout believer in the Native American Church. Black credits his religious faith for his longstanding sobriety and personal convictions.

Black has a strong interest in ensuring that government employees understand their free exercise rights under the First Amendment. Nearly forty years ago, Black was fired and denied unemployment benefits because of confusion surrounding the constitutional limits on the free exercise of religion. Coach Kennedy's dismissal by Bremerton School District demonstrates that this confusion persists today. Black believes that government employees like Coach Kennedy deserve the guidance of a clear rule delineating the bounds of their free exercise rights within the limits of the Establishment Clause.

After his time in the Navy, Black battled alcohol dependency. He spent several years teetering between dependence and sobriety. Black has now been sober for nearly forty years. He credits his sustained sobriety to his religious practice in the Native American Church. Black found spiritual healing through the religious ingestion of peyote, which is central to Native American Church rituals. *Emp. Div. v. Smith*, 485 U.S. 660, 661-62, 67 (1988) ("*Smith I*"). In the Church, peyote is considered a deity. It "constitutes in itself an object of

---

[1] This brief was prepared and funded entirely by amicus and his counsel. No other person contributed financially or authored any part of the brief. All parties have granted blanket consent for the filing of *Amicus Curiae* briefs in this matter.

worship; prayers are directed to it much as prayers are devoted to the Holy Ghost." *Id.* at 667 n.11. However, the ingestion of peyote—even for religious reasons—was illegal under Oregon law at the time. *Id.* at 662.

After achieving sobriety, Black became a counselor at the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment ("ADAPT"). *Id.* at 662. ADAPT had partnered with the State of Oregon as part of an initiative to provide substance abuse rehabilitation and treatment programs tailored to Native Americans. Through his work at ADAPT, Black became acquainted with Alfred Smith, who was also a counselor there. In 1984, Black and Smith were fired as counselors at ADAPT because of their religiously motivated ingestion of peyote. The State of Oregon, noting that they had committed an offense under state law, denied them unemployment benefits. *Id.* at 663-64. Black and Smith challenged this decision under the Free Exercise Clause. *Id.* This Court denied their claim, holding that Oregon's prohibition on peyote use was neutral and generally applicable and therefore did not violate the Free Exercise Clause. *Smith II*, 494 U.S. at 878-89.

Oregon subsequently enacted an amendment to its laws and created a religious accommodation for the ingestion of peyote. Or. Rev. Stat. § 475.752(4) (2020). Oregon's decision to accommodate Black's religious practice has helped him to maintain his sobriety and live out his faith in compliance with the law. Because he too was fired for practicing his religion, Black has a strong interest in ensuring that government employees know their religious rights

under the First Amendment. He believes that government employees like Coach Kennedy deserve the guidance of as clear a rule as possible regarding the Establishment Clause so they may follow their religious convictions within the limits of the law.

SUMMARY OF ARGUMENT

I. Over thirty years ago, Galen Black lost his job because employee free exercise rights were ill-defined and poorly understood. Decades later, little progress has been made. Public employees, in particular, face uncertainty regarding what protection their exercise of religion enjoys. Public employers also lack clear guidance concerning their obligations under the Establishment Clause. Most of the confusion today is the result of this Court's repeated efforts to create a one-size-fits-all test for all Establishment Clause cases. As laudable as that goal is, Bremerton misunderstood this Court's prior decisions and the Ninth Circuit entirely misapplied them.

This case is an opportunity for the Court to provide some clarity and set forth a straightforward standard: a public employee's private exercise of religion violates the Establishment Clause only if there is objective evidence of coercive pressure. This could include allocating actual benefits or burdens in a discriminatory fashion based on a person's reaction to the challenged religious exercise; directing other individuals to pray; or singling out dissidents for punishment. Public employees actively proselytizing to third parties would fit the standard. So, too, would a coach granting extra playing time to football players who prayed with him or giving extra conditioning

assignments to those who did not. Praying in front of a captive audience might also qualify as coercion, as would requiring students to attend religious services.

II. The objective coercion test rests on the theory of religious volunteerism. Both the Free Exercise Clause and the Establishment Clause protect religious liberty. When properly interpreted, they work together to protect all of us—believers and nonbelievers alike. They do this by minimizing the influence the heavy hand of government could have on people's religious volunteerism. The objective coercion test in this type of case acknowledges the importance of maximizing religious choice for all.

A. Allowing public employees to exercise their religion does not distort a third party's religious choice. It is true that some players may see Kennedy's behavior and feel inclined to follow his example. But it is just as likely that many players will feel otherwise. Even if a majority of students voluntarily joined Kennedy, that fact alone does not suggest that government is distorting religious volunteerism. Experiencing social pressure, without actual coercion, is simply part of living in a pluralistic society—especially in a country as diverse as ours. Social pressure, by itself, does not suggest government interference with religious volunteerism. If it did, the test would then be dependent on the demographics of a given area, rather than on a neutral principle. As a result, public employees would be free to practice their religion if they are an extreme minority but not if they are part of the majority or even a large minority. That inconsistency alone is unjust and unworkable.

B. In contrast, refusing to allow public employees to outwardly express their religion will distort

religious volunteerism. If public employers may terminate employees for any demonstrable exercise of religion visible to third parties, public employees like Kennedy would face immense pressure to change their religious behavior. A stereotypical and loathsome hallmark of regimes that oppress religious liberty is that they force citizens to choose between their religions and their livelihoods. While some may be willing to sacrifice their jobs, far too many will succumb to government pressure to change their religious practices or hide their faith for fear of censure.

As a result, students will suffer from a learning environment that does not reflect the real world. The only examples to which they will be exposed are those public employees whose religious beliefs require absolutely no outward expression, those who purport to have no religion at all, or those willing to abandon their religious identities. Students will be forced to conform to the false reality presented to them by the hand of government or to leave public school altogether. This is inconsistent with any notion of true religious volunteerism—the heavy hand of government would be distorting everyone's religious choices.

III. The objective coercion test also finds support in the original understanding of the Religion Clauses. As history reveals, religious volunteerism is one of the most fundamental principles on which the Religion Clauses rest. The objective coercion test is anchored in this voluntarist view of the Religion Clauses, preserving the original understanding even in today's society, where government regulates far more than the Founders ever envisioned.

A. The Religion Clauses are two sides of the same coin, each safeguarding the shared goal of maximizing religious volunteerism. They reflect a thoughtful compromise reached by the framers of our Constitution to satisfy those concerned with protecting religious exercise, those concerned about government's effects on establishments of religion, and those concerned about government interference in the states. Despite the many disagreements among the delegates, there was one area of common ground: minimal government interference with religion. Beyond this general agreement, everything else was contested. Yet it was precisely because perspectives varied that the Religion Clauses—and a principle of religious volunteerism—came about.

B. The Religion Clauses reflect the nation's growing religious pluralism at the time of the founding. Because many of the most ardent and enthusiastic religionists of the time championed the Clauses, it would be easy to assume the Clauses encourage government entanglement with religion. But this would be a mistake. The delegates found common ground in keeping government out of their religions precisely because they all traveled down different theological paths. At the same time, it would be an equally egregious mistake to assume the Clauses place secularism on a pedestal over religion. Indeed, it was not secularists who were the primary champions of the Clauses, but those who took their religion the most seriously.

Although the degree of tolerance varied from one state to the next, no one seriously advocated for religious homogeneity across *all* states in the new country. Perhaps not so remarkable to citizens today,

this embrace of plurality was nonetheless progressive for its time. Even if that would mean occasionally encountering people with very different views, at least it would not mean government forcing unanimity of religious opinion on everyone. The Constitution's Test-Oath Clause further reflects this appreciation for religious pluralism and the desire to minimize any incentive for government to pressure people to alter their religious behavior.

IV. Not only is an objective coercion test consistent with principles of religious volunteerism grounded in history; it is also normatively justifiable in three ways: it avoids absurd results, supplies a manageable framework, and is not at odds with prior precedent.

A. In the context of private religious exercise by public employees, the endorsement test adopted by the Ninth Circuit leads to absurd outcomes and confusing and conflicting results. The Court need only look north to the Canadian province of Quebec to find an example. Concerned about public employees endorsing religion through private religious exercise, Quebec lawmakers banned from many government positions anyone who wears religious garb as part of their religious exercise. Yarmulkes, crosses, hijabs, kufis, visible undergarments, jewelry, turbans—all are forbidden. That type of discrimination against members of many of the world's major religions is absurd and should fail completely under the Court's precedent. The longer the endorsement test percolates in the United States for public employees exercising their religion, the more likely similar outcomes will arise here.

B. The objective coercion test also provides an administrable framework. Both public employees and

their employers suffer if the standards used to mitigate their disputes are unclear. Bremerton took action to protect itself from a potential constitutional violation. Kennedy wanted only to protect his free exercise rights. Both sides tried to compromise but felt trapped by the law. Without a manageable test, employees will continue to find themselves unsure of their rights, forced to choose between their religion and their career. Employers, eager to avoid constitutional litigation, might continue to prohibit more exercise than necessary as a prophylactic measure. An objective coercion test empowers public employees to know what behavior to avoid, and it gives employers clear guidance on which behavior requires action on their part.

C. This Court need not upset existing precedent to apply the objective coercion test to public employees privately exercising their religion. Previous cases presented concerns about coercion, so the concept is not new. Other cases involved different facts from those posed here, so the tests in those cases do not apply. The objective coercion test in this limited context is consistent with the two most important precedents: *Lee v. Weisman* and *Santa Fe v. Doe.* None of the concerns present in *Weisman* and *Santa Fe* are present in this case. The religious choice lies entirely with the public employee, with no involvement from the state. The choice to participate or associate with that religious exercise rests entirely with students or, outside the school context, other third parties. Government, as government, would have no involvement. Concerns about state action or the tyranny of the majority are absent. Where public employees outwardly express their religion, the government's only involvement is limited to

permitting such exercise and then moving out of the way.

There will certainly be hard cases, as there are with any legal rule, but the objective coercion test will reduce their number and will ensure that individuals whose religions require an outward expression of an inner faith are not cast out from public employment.

ARGUMENT

Over thirty years ago, Mr. Black's employer terminated him from his job and the state of Oregon denied him unemployment benefits simply because he had exercised his religion. This left both him and other employees on unstable ground. Decades later, little progress has been made. Public employees, in particular, face uncertainty regarding what protection their exercise of religion enjoys. This case is an opportunity for the Court to provide some clarity.

The Court has noted that "public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). From there, however, as Mr. Black explained in his cert-stage amicus brief, the Court has sown as much confusion as certainty, for both public employers and their employees. *See generally* Brief for Galen Black as Amicus Curiae in Support of Petitioner, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 857 (2022) (No. 21-418). Most of this confusion has come from the Court's attempts to provide a one-size-fits-all test for determining when government has violated the Establishment Clause.

As laudable as that goal is, the Court's decisions have done little to provide proper guidance for the facts presented in cases like this, where a public employee desires to exercise his religion and his employer is fearful of violating the Establishment Clause.

The Court has offered several opinions that provide some direction but none directly on point. One case involved mandatory student prayer. *Engel v.*

Vitale, 370 U.S. 421 (1962). Another involved laws requiring teachers to open each school day with Bible readings. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). Others involved prayers at graduations and sporting events, or voluntary religious exercise and speech by students. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995); *Lee v. Weisman*, 505 U.S. 577 (1992). Still others involved school funding or equal access for religious groups. *See, e.g.*, *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). None answers how the Constitution applies when public employees exercise their religion.

Bremerton misunderstood this Court's decisions, and the Ninth Circuit entirely misapplied them. This is an all-too-common and persistent problem. As Professor Thomas Berg has said, in the name of avoiding Establishment Clause violations, school "administrators now often go far beyond what the Supreme Court has required in keeping religious views out of public arenas." *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 749 (1997).

Mr. Black's cert-stage amicus brief placed this case in the broader context of the Establishment Clause doctrines that have emerged from *Santa Fe*, *Weisman*, and the earlier precedents they applied. It argued that a public employee's private exercise of religion results in an Establishment Clause violation only if there is objective evidence of coercive pressure for others to participate. This brief elaborates on that argument, offering a theoretical underpinning for the test and explaining why it is consistent with an original understanding of the Religion Clauses, is

manageable, avoids absurd results, and is consistent with this Court's precedents.

I. The Court Should Adopt an Objective Coercion Test When Determining if Public Employee Religious Exercise Violates the Establishment Clause.

The Court has used several terms and tests to describe when an Establishment Clause violation occurs. *See* Brief for Galen Black as Amicus Curiae in Support of Petitioner, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 857 (2022) (No. 21-418) (noting the Court has at various times adopted the coercion, endorsement, historical, and multi-pronged *Lemon* tests). In the context of cases involving public employees privately exercising their religious beliefs, however, the question lower courts and public employers should be asking is whether the exercise of religion coerces third parties into engaging in the religious exercise.

To succeed on any claim of coercion under facts like these, then, a party claiming an Establishment Clause violation would need to make an actual showing that the public employees levied coercive pressure against others to join in or abstain from religious exercise. A student's representation that she merely felt compelled to participate or abstain from certain religious practices, without more, would be insufficient. The psychological state of the person claiming coercion, absent other evidence, cannot be the test, for it is unfalsifiable and therefore endlessly pliant.

Rather, the analysis is objective. While there may be difficult cases, examples of objectively coercive

behavior spring quickly to mind. This could include allocating actual benefits or burdens in a discriminatory fashion based on a person's reaction to the challenged religious exercise; directing other individuals to pray; or singling "out dissidents for opprobrium." *Town of Greece v. Galloway*, 572 U.S. 565, 588–89 (2014) (plurality opinion). Public employees actively proselytizing to third parties would fit the standard. So, too, would a coach granting extra playing time to football players who prayed with him or giving extra conditioning assignments to those who did not. Praying in front of a captive audience might also meet the standard, as would requiring students to attend religious services.

On the other hand, examples abound of public employees exercising their faith in a way that includes no indicia of objective coercion. A Christian teacher does not objectively coerce her students when she prays over her lunch in their presence—a practice that the panel below took pains to explain did not violate the Establishment Clause. *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004,1015 (9th Cir. 2021). Yarmulkes worn by Jewish teachers and burqas worn by Muslim teachers are not coercive in any objective sense, nor are kosher or halal meals. This is true even if students understand that these actions stem from teachers' religious convictions, because nothing about these exercises of religion brings the coercive power of government to bear on the students.

To illustrate the point, consider a coach offering a brief, private prayer in the locker room before the game, or making the sign of the cross as a celebration when his team scores a touchdown, or pointing to the

sky as a gesture to heaven to celebrate a win. Then imagine the same coach ordering his players to do the same or punishing them if they did not emulate his behavior. The latter is a violation; the former is not. In these cases, what matters is whether the public employee uses his government position to coerce others, not whether he happened to be fulfilling his official duties at the time he engaged in the religious exercise.

II. The Objective Coercion Test Is Consistent with Principles of Religious Volunteerism.

Both the Free Exercise Clause and the Establishment Clause protect religious liberty. As this Court and numerous scholars have recognized, they work together, when properly interpreted, to protect all of us—believers and nonbelievers of every religious doctrine. They do this by minimizing the influence the heavy hand of government has on people's religious volunteerism. "By minimizing government influence, they maximize religious liberty." Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 373 (1992).

A. Allowing Public Employees to Exercise Their Religion Will Not Distort Religious Choices.

The objective coercion test in this type of case is consistent with this principle of preserving religious volunteerism.[2] It acknowledges the importance of

[2] For various explanations of the principle, *see* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W.VA. L. REV. 51 (2007); Thomas Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 749 (1997); Michael W. McConnell, *Religious Freedom*

protecting religious free exercise, as well as shielding us from those in government who would force religion upon us.

This case is a good test example. Kennedy already agreed to stop any locker room or after-game speeches with religious content. JA77, 80. He asked only for the right to pray by himself at the end of each game. JA71–72. That is the relief he sought in his complaint. JA165. It was only that private religious exercise that could have caused the Establishment Clause violation that so worried the school district. That behavior brings with it no evidence of coercive pressure and thus would pass the objective coercion test.

Allowing it will not affect or distort Kennedy's religious choices. He already believes he has a duty to God to offer a prayer of gratitude after each game. He has already shown that he will engage in that exercise of his religion or face termination.

The Court can expect the same outcomes with any employees who take their religion seriously. For those who believe they have a spiritual necessity or owe a duty to engage in certain religious exercise no matter where they are, their only option is to do it on the job or give up their position. This could include Muslims who pray, Jews who wear yarmulkes, Sikhs who wear turbans, Buddhists who chant, or Christians who offer a prayer before a meal. A non-coercion principle

---

at a Crossroads, 59 U. CHI. L. REV. 115 (1992); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

will not impact what they already believe to be an imperative.

Of course, Kennedy is not alone. The religious volunteerism of his students, coworkers, and the public is also of paramount importance. His coworkers and the public generally are of little concern, for the majority likely did not even notice his actions (at least prior to the case becoming so highly publicized). To the extent any did, Kennedy was in no position to affect their lives or place any sort of pressure—coercive or otherwise—on them.

The students pose a different concern and deserve deeper analysis. Some players may see Kennedy's behavior and feel inclined to follow his example. But it is just as likely that many players will feel otherwise. Some may be repulsed by it. Some may be drawn to the Buddhist coach who offers a chant on the field after a game. JA128, 151, 170, 333. Others may be attracted to the coach who outwardly expresses no religious beliefs at all. Still others may not care one whit what any of their coaches are doing religiously once the final whistle has been blown, the handshakes are finished, and their fellow classmates in the stands are ready for the post-game parties.

The record shows that some players decided to join Kennedy as he prayed. JA98, 149. That they made that voluntary choice is not evidence, by itself, of coercive pressure or a distortion of their religious volunteerism. It is only evidence that some students found Kennedy's religious identity attractive, either because they already shared it or because they saw in him something they might have wanted to explore for themselves. The attractiveness of a public employee's religious exercise or identity—or lack thereof—cannot

be the basis for an Establishment Clause violation. If it were, the universe of potential violations would be limited only by the number of people employed by the government.

Even if a majority of the students had voluntarily joined Kennedy, that fact alone does not suggest government is distorting religious volunteerism. The concern is that the student majority would place social pressure on religious dissenters, but experiencing social pressure, without actual coercion, is simply part of the price we all pay for living in a pluralistic society. In a country as diverse as ours, we will all, at different times and places, be on both the receiving and giving end of such pressure. By itself, it does not suggest *government* interference with religious volunteerism.

That is in stark contrast with what troubled the Court in *Lee v. Weisman*. There, the Court placed considerable concern on government's use of "social pressure to enforce orthodoxy." *Weisman*, 505 U.S. at 594. The concern of social pressure, however, arose only because the Court found that the state had already required students to attend graduation ceremonies; they were a captive audience, with no choice but to participate or protest. *Id.* That is not the case when public employees exercise their religion. To the extent other students voluntarily join, and that joining creates a subjective sense in others to participate, pressure exists, but not pressure from the state.

If it were deemed so, the test would then be dependent on the demographics of a given area, rather than a neutral principle. Public employees would be free to practice their religion if they are an

extreme minority but not if they are part of the majority or even a substantial minority. That inconsistency alone would invalidate the rule; it is as unjust as it is unworkable.

Even outside of this specific context, there is no reason to think that public employees engaging in religious exercise will affect the religious volunteerism of their coworkers, employers, or the public. In most instances, those third parties will likely not even notice the religious exercise occurring. The rare times they do, it will more often than not appear as nothing more than an oddity to a religious outsider. Some may be offended by it, but that is a burden they will need to overcome in a pluralistic society. Their own religious choices will not be influenced.

It is plausible that a coach's or teacher's unique position of power makes anything he or she does coercive, creating a heightened responsibility not to practice religion in front of students. That influence, however, is diluted by allowing the same rule to apply to all. When all public employees can live according to their religious identities without restriction or encouragement from government, students will be exposed to many different types of believers and nonbelievers. None necessarily enjoys more coercive power than the other. Students have the opportunity to observe them all, then decide for themselves which they find attractive.

B. Refusing to Allow Employee Religious Exercise Will Distort Religious Volunteerism.

In contrast, were public employers allowed to terminate employees for any demonstrable exercise of religion visible to students or the public, employees like Kennedy would face immense pressure to change their religious behavior. A stereotypical and loathsome hallmark of regimes that oppress religious liberty is that they force citizens to choose between their religions and their livelihoods.[3] While some may be willing to sacrifice their jobs, far too many will succumb to government pressure to change their religious practices or hide their faith for fear of censure.

Students, meanwhile, will face strong manipulation. In contrast to what they will experience in the real world, the only examples to which they will be exposed in schools are those whose religious beliefs require absolutely no outward expression, those who purport to have no religion at all, or those willing to abandon their religious identities. Some students with resources will opt out of public schools and attend private religious schools. For the rest, their only option will be to conform to the false reality presented to them by the hand of government. There are some who, when being honest, would no doubt welcome that outcome and perhaps even push for it,[4] but it is not consistent with any

---

[3] Consider, for example, the English Test Acts and penal laws that excluded Catholics from a number of occupations.

[4] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (noting that the state seemed to want to use public schools to give Amish children a chance to leave their religious upbringing, which

notion of true religious volunteerism. From the employees, to the students fleeing to private schools, to those left behind, the heavy hand of government would be distorting everyone's religious choices.

The Court has recognized the importance of government neutrality to assuage the disease of religious disputes. In its first Establishment Clause decision of the modern era, the Court stated its rule in broad terms: the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and nonbelievers." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). In both *Sherbert v. Verner* and *Wisconsin v. Yoder*, it explained that religious exemptions "reflect[] nothing more than the governmental obligation of neutrality in the face of religious differences." 374 U.S. 398, 409 (1963); 406 U.S. 205, 235 n.22 (1972). And in *Schempp*, the Court applied a principle of neutrality in the Establishment Clause context, defining it as a position that neither advances nor inhibits religion. 374 U.S. at 222.

These statements reflect the value the Court has placed on religious volunteerism. An objective coercion test in the context of public employees privately exercising their religion preserves that principle.

III. An Objective Coercion Test Is Consistent with an Original Understanding of the Religion Clauses.

This Court's precedent makes clear that history and tradition play an important role in adjudicating Establishment Clause issues. Each Establishment

---

would cause the State to "influence, if not determine, the religious future of the child.").

Clause case, including those involving "religious expression in public schools," contains an "overarching set of principles" rooted in history. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2092–93 (2019) (Kavanaugh, J., concurring). As already explained, the objective coercion test is consistent with the principle of preserving religious volunteerism. And that principle, in turn, is one of the most fundamental of those rooted in Religion Clause history.

A. The Religion Clauses Share the Same Goal of Maximizing Religious Volunteerism.

The Religion Clauses reflect a thoughtful compromise reached by the framers of our Constitution. To ensure successful ratification after debate and exchange, they selected the final language to simultaneously satisfy those concerned about protecting religious exercise, those concerned about government's effects on establishments of religion, and those concerned about broader government interference in the states. *See* Letter from Joseph Spencer to James Madison (Feb. 28, 1788), *in* 2 DEBATE ON THE CONSTITUTION 267 (1993) (discussing the influential Baptist and Protestant constituencies in Virginia who would oppose ratification absent free exercise protections); 1 ANNALS OF CONG. 949–50 ("It is a religious matter, . . . let it be done by the authority of the several States."); 2 THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 435, 436 (Elliot 2d ed. 1836) (recording the federalism concerns of Pennsylvania's James Wilson, as well as

Massachusetts' James Bowdoin and Theophilus Parsons).

Despite the many disagreements among the delegates, there was one area of common ground: minimal government interference with religion to ensure maximum religious volunteerism. "The overriding objective of the Religion Clauses was to render the new federal government irrelevant to the religious lives of the people." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 168–69 (1992). Drawing on their proximity to the long history of religious persecution in Europe, the framers viewed coercion as the direct result of "[a]n establishment [of religion]" due to "the promotion and inculcation of a common set of beliefs through governmental authority" that such systems produced. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003). Whatever test the Court adopts, it should be one that directs government, as much as possible, to leave public employee religious choices alone.

Beyond this general agreement among the delegates, everything else about church-state relations was contested. *See* DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776-1833 8–12 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019) (discussing the wide variance of state establishments and the disestablishment paths taken). The thirteen colonial governments each featured different approaches for how to deal with the government-religion relationship. *Compare* Rhode Island and

Pennsylvania (no history of establishment), *with* Virginia's A Bill for Establishing Religious Freedom (1786) (disestablishment shortly before ratification), *and with* MASS. CONST. OF 1789, pt. I, arts. II–III (continued establishment after ratification but guaranteeing free exercise to religious dissenters). Yet it was precisely *because of* this variance that the Religion Clauses came about and a principle of religious volunteerism emerged.

B. The Religion Clauses Reflect a Value for Religious Pluralism that Stems from Religious Volunteerism.

The Religion Clauses are also grounded in a principle of pluralism, which is the result of allowing religious volunteerism. Because they were championed by many of the most ardent and enthusiastic religionists of the time, it would be easy to assume the Clauses were meant to encourage government entanglement with religion. This would be a mistake. The supporters of the Clauses all came from very different religious traditions, which they guarded jealously. They may have found common ground in keeping government out of their religions, but they all traveled down different theological paths from there. And they wanted no one to interfere.

It would be an equally egregious mistake to assume the Clauses reflected a desire to place secularism on a pedestal over religion. It was not secularists who were the primary champions of the Clauses, but those who took their religion the most seriously. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437–41 (1990).

What each group saw was a world in which all of them could live alongside one another in peace. That might mean they would occasionally have to deal with people of very different views. It might mean they would have to associate with those they viewed as foolish, obnoxious, or even theologically dangerous. But at least it would not mean that government would be forcing unanimity of religious opinion on everyone.

Though not a part of the fervent religious groups, Madison held a similar view. *Berg*, 72 NOTRE DAME L. REV. at 710. He appealed to a tolerant and pluralistic vision of society. In particular, he stressed equal security for both civil and religious rights. Rather than privilege non-religion over religion, Madison astutely recognized the need for government neutrality. Otherwise, the heavy hand of government in favor of secularism could distort individual religious exercise and undermine the creation of a pluralistic society: "In a free government, the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects." THE FEDERALIST NO. 51.

Although the degree of tolerance varied from one state to the next, no one seriously advocated for religious homogeneity across *all* states in the new country. Perhaps not so remarkable to citizens today, this view of pluralism was nonetheless progressive for its time, especially compared to European religious establishments. In contrast to that oppression, Hamilton reminded the public that "nothing could be more ill-judged than the intolerant spirit. . . . For, in politics as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in

either can rarely be cured by persecution." THE FEDERALIST NO. 1.

Further reflecting an appreciation for religious pluralism was the Test-Oath Clause. Other than the Religion Clauses, the Constitution only makes one additional reference to religion. In Article VI, both state and federal government officials must swear to "support this Constitution . . . but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, § 3. Despite some founding-era state governments requiring such religious tests, Article VI sparked almost no opposition after South Carolina's Charles Pinckney introduced the idea during the Constitutional Convention. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 at 478 (Max Farrand ed., 1911) (recording the objection from Roger Sherman who "thought it unnecessary" in light of "the prevailing liberality being a sufficient security ag[ain]st[] such tests"—the only objection to the Test-Oath Clause). Highlighting the pluralistic gloss on the Religion Clauses, this prohibition on religious tests for federal office provides additional evidence of the Founders wanting to minimize any incentive by government for people to alter their religious behavior.

Today's circumstances are markedly different from those at the founding, but the history-based principle of preserving volunteerism can and should still apply to public employees despite the changed factual circumstances. The objective coercion test is anchored in this voluntarist view of the Religion Clauses, preserving the original understanding even

in today's society, where government regulates far more than the Founders ever envisioned.

IV. An Objective Coercion Test Will Avoid Absurd Results, Is Manageable, and Will Not Affect Prior Precedent.

A. An Objective Coercion Test Will Avoid Absurd Results.

Many of the tests this Court has adopted to find Establishment Clause violations have the potential to yield absurd results in the context of public employees exercising their religion. This is especially true of the endorsement test applied by the Ninth Circuit.

The endorsement test prohibits state action that has the purpose or effect of endorsing religion. *See County of Allegheny v. ACLU*, 492 U.S. 573, 592–93 (1989) (stating this rule and equating the term "endorsement" with "favoritism" and "promotion"). Applying this test to a public employee is difficult, for nearly any outward religious act could potentially be seen as an endorsement of religion. Drawing the line between permissible and impermissible exercise would be nearly impossible, as this case proved below. The difference between a Christian coach praying on the field and a teacher praying over her meal while visible to students is difficult to identify. The Ninth Circuit declared that such expressions are "wholly different" from one another, but it provided no rationale as to why. *Kennedy*, 991 F.3d at 1015. The result is that declaring one form of religious exercise an endorsement likely means forbidding them all.

For proof of this, the Court need only look north. The Canadian province of Quebec serves as an example of the types of absurd outcomes that stem

from a worry over whether public employees' religious exercise might present an implied endorsement of religion.

Moving well past the theory undergirding our Establishment Clause, Quebec law considers the "laicity" or "secularism" of the state to be a fundamental freedom. *See* Charter of Human Rights and Freedoms, R.S.Q., c C-12 (Can). In 2017, lawmakers in Quebec, fearful that allowing public officials to express their religious beliefs would be seen as an impermissible endorsement by the government of religion, passed a law aimed at "foster[ing] adherence to State religious neutrality." The legislature prohibited the wearing of any face coverings by public officials while performing their duties. "An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies," SQ 2017, c 19 (Can.).

The act, highly criticized for its discriminatory impact against Muslims, was struck down by numerous Canadian courts. National Council of Canadian Muslims (NCCM) c. Attorney General of Québec, 2018 QCCS 2766 (Can.). In response, the Quebec legislature passed an even more widely restrictive bill prohibiting most public officials from wearing any religious symbol at any time while performing their job. An Act Respecting the Laicity of the State, S.Q. 2019, c 12, s 6 (Can.). The act's capacious definition of a religious symbol includes "any object . . . that (1) is worn in connection with a religious conviction or belief; or (2) is reasonably considered as referring to a religious affiliation." *Id.*

The implications of this act are stunning: religious officials cannot wear a cross, turban, yarmulke, hijab, or any head covering while on the job. And as a result, a practicing member of any religion that requires religious garb or symbols is effectively forbidden from seeking a government career. Muslims, Hindus, Christians, Sikhs, Jews, and any number of other religious minorities are faced with a Hobson's choice: give up your livelihoods or contradict the clear teachings of your religion. The result has been widespread protests by religious minorities and those who support them.

Only two kinds of people are left unscathed by the act: those whose religious beliefs require absolutely no outward expression and those who claim to have no religion at all. Ironically, though Quebec has sought to avoid all conceivable endorsement of religions, its actions have had the practical effect of endorsing symbol-less religions and no religion, at the exclusion of all others.

This absurd outcome arises from applying the endorsement test in the wrong context. The longer it percolates in the United States, inadequately defined and misapplied, the more likely similar outcomes will arise here.

B. An Objective Coercion Test Is Administrable.

The present dispute is before this Court because neither Bremerton nor Kennedy were sure of their rights and obligations under the Religion Clauses. In light of unclear guidance, Bremerton took action to protect itself from a potential constitutional violation. Both sides were willing to compromise, but, in the

end, Kennedy felt his religious obligations required more of him than Bremerton felt it could allow. While the school district ultimately failed to stay out of court, it is easy to be sympathetic to its concerns.

Both public employees and their employers suffer if the standards used to resolve their disputes are unclear. Employees will find themselves unsure of their rights, forced to choose between their religion and their career. Employers, eager to avoid the time and expense that attends constitutional litigation, might prohibit more exercise than necessary as a prophylactic measure.

The objective coercion test allows the court to provide a clear test while maximizing religious volunteerism. It focuses entirely on actions under public employees' control. It allows employers to act only on objective evidence of coercion, rather than reacting fearfully to mere allegations of constitutional violations.

An objective coercion standard minimizes judicial discretion and maximizes employees' power to conform their religious behavior to the requirements of the Establishment Clause. It is an easy-to-understand standard that provides assurance to both public employees and their anxious employers.

Perhaps most importantly, it is not reliant on the subjective feelings and accusations of third parties. If the Court were to take into account students' subjective feelings of coercion, teachers seeking to avoid creating such feelings would be forced to walk on eggshells. The burden would fall to them to judge how every person present would respond to their religious exercise, every time they engage in such

exercise, no matter whether it included saying a private prayer, wearing religious headwear, eating a religious meal, and so on. Worse, it might take only one error of judgment for religious teachers to lose their jobs.

C. An Objective Coercion Test in This Context Is Consistent with This Court's Prior Precedent.

The Court need not upset existing precedent to apply the objective coercion test to public employees privately exercising their religion. Concerns about coercion have existed in all of the Court's previous cases, so the concept is not new. Many of the Court's Establishment Clause cases involved factual scenarios of a different type from what is posed here, so the tests in those cases do not apply. The cases that might seem factually similar and arguably employed an endorsement test did so under very different factual scenarios.

The two most important are *Lee v. Weisman* and *Santa Fe v. Doe.* Three factors distinguish *Weisman* from these cases. First, the decision for a prayer to occur at a graduation ceremony rested entirely with the school principal. *Weisman*, 505 U.S. at 581. As the Court noted, that was "a choice attributable to the State," as was the choice of which religious participant would offer the prayer. *Id.* at 587. Second, because the prayer occurred at a graduation ceremony, students "had no real alternative . . . to avoid the fact or appearance of participation" in the prayer. *Id.* at 588. Third, the social pressure the Court discussed in that case mattered to the Court only because the audience was captive. *Id.* at 594. To the

extent the Court employed an endorsement test in that case, it did so only because of those factors.

None is present when public employees engage in private religious exercise. The choice for religious exercise to occur or not lies entirely with the public employee, with no involvement from the state. A teacher who prays one day, then loses her faith for any number of reasons, may not pray the next, only to return to it again a year later. The choice is hers and hers alone. The choice to participate or associate with that religious exercise rests entirely with students or, outside the school context, other third parties. Government as government would have no involvement.

In *Santa Fe*, what drove the Court to worry about endorsement was state action and the tyranny of the majority. 530 U.S. at 295–98. State actors, acting as state actors, created a system of student voting in which they knew the majority would be able to force the minority to participate in religious prayers. *Id.* For public employees exercising their religion, the government's only involvement is to permit people to exercise their religion, then get out of the way. Unlike in *Santa Fe*, the religious exercise of public employees is not "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer." *Id.* at 310.

The Court should treat like cases alike, and different cases differently. Cases like Coach Kennedy's, where public employees exercise their religion, are not cases of government endorsing prayer at football games or graduations. They are not

cases of teachers or administrators forcing diluted prayers or scripture study on students. Nor are they cases of government funding religion. They are in a category of their own, and should be treated as such.

In short, the Court may resolve this case with an administrable rule that maximizes religious volunteerism and does not upset prior precedent.

CONCLUSION

The Court should reverse the judgment below and adopt a clearer standard for what constitutes an Establishment Clause violation in the context of public employees privately exercising their religion.

Respectfully submitted,

Steven T. Collis
Counsel of Record
Law & Religion Clinic
University of Texas
School of Law
727 E. Dean Keeton St.
Austin, TX 78705
512-475-9090
Steven.collis@law.utexas.edu

March 2, 2022