No. 21-418

In the Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Christian Legal Society (CLS) is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with members in every state and chapters on over 115 law school campuses. CLS's legal advocacy division, the Center for Law & Religious Freedom, works to protect the free-exercise rights of all citizens.

In this case, the court below upheld the suspension of a high school football coach for engaging in brief, on-the-field prayer after the conclusion of games. Such prayers, the court concluded, could be perceived as endorsing religion in violation of the Establishment Clause. If affirmed, the Ninth Circuit's decision will convert the Establishment Clause from a protection against state-imposed religion into a cover for suppressing private religious speech. CLS thus has a strong interest in this important case.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* curiae or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Bremerton School District believes that a football coach's personal 30-second prayer said on the field after the conclusion of a game violates the Constitution's prohibition on government from making any law "respecting the establishment of religion." U.S. Const., Amend. I. That is wrong.

The Establishment Clause is not violated by government toleration of private religious speech. Indeed, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.). That "crucial difference" is key here. *Id.*

An Establishment Clause violation "must be moored in government action." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring). Absent any promotion or favoritism of a certain religion, "the mere fact" that religious expression "occurs in a government setting does not render it unconstitutional." *Warnock v. Archer*, 380 F.3d 1076, 1082 (8th Cir. 2004) (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-95 (1993)).

There is simply no reasonable argument that Coach Kennedy's half-minute, private prayer after a football game violated the Establishment Clause because it was in the public's view. Indeed, such prayers are "clearly personal and do[] not convey the

impression that the government is endorsing [them]." *Id.* Thus "the mere fact that [they] occur[] in a government setting does not render [them] unconstitutional." *Id.*

The district's fear that someone might misperceive Coach Kennedy's private religious speech as government speech that violates the Establishment Clause cannot justify suppressing his speech and suspending him. Banning Coach's Kennedy religious expression—as the district did here—is unconstitutional content- and viewpoint-based discrimination. Where there is "no valid Establishment Clause interest," the Establishment Clause cannot justify such discrimination. *See Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 113-14 (2001).

The Court should reverse the decision below.

ARGUMENT

I. There is no reasonable argument that Coach Kennedy's private religious expression violated the Establishment Clause.

A. The government does not run afoul of the Establishment Clause by tolerating private religious expression.

"The Establishment Clause prevents the government from using its vast powers of communication to promote explicitly religious beliefs and practices." Carl H. Esbeck, *After* Espinoza, *What's Left of the Establishment Clause?*, 21 Federalist Soc'y Rev. 186, 12 (2020). But government toleration of private religious expression does not violate the

Establishment Clause. Simply put, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (plurality op.).

An Establishment Clause violation "must be moored in government action." *Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 779 (O'Connor, J., concurring). To find a violation, this Court has typically required some sort of governmental "promotion" or "favoritism" of religion. *Id.* at 763 (citing *County of Allegheny v. American Civil Liberties Union, Greater Pittsburg Chapter*, 492 U.S. 573, 593 (1989)). Absent that, "the mere fact" that religious expression "occurs in a government setting does not render it unconstitutional." *Warnock*, 380 F.3d at 1082 (citing *Lamb's Chapel,* 508 U.S. at 394-95).

"This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 144-45 (1987)); *see also Warnock*, 380 F.3d at 1083 (explaining that this Court "has repeatedly held that government attempts to accommodate private religious belief, even when not required by the free exercise clause, do not in themselves violate the establishment clause"); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring) ("allow[ing] private religious speech in

public forums … does not violate the Establishment Clause") (collecting cases). That makes sense, because the key principle behind the Establishment Clause is "to keep government from interfering with the private religious choices made by citizens." Esbeck, *supra,* 4. A state "cannot hamper its citizens in the free exercise of their own religion." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2020 (2017) (quoting *Everson v. Board of Education of Ewing*, 330 U.S. 1, 16 (1947)). And it cannot use the Establishment Clause to do so. The Constitution's free exercise protections would be greatly diminished if the government could not tolerate private religious expression. The government simply does not "establish" a religion by allowing private religious speech.

Indeed, there remains "play in the joints between what the Establishment Clause permits and the Free Exercise Clause compels." *Espinoza v. Montana Dept. of Rev.*, 140 S. Ct. 2246, 2254 (2020). At the very least, that space allows for brief, personal displays of faith.

This Court has long held that private religious speech on public school property does not violate the Establishment Clause. *See, e.g.*, *Good News Club*, 533 U.S. at 112-19 (allowing private organization to use classrooms for after school religious instruction); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 937-46 (1995) (allowing a Christian student newspaper to receive university funding); *Lamb's Chapel*, 508 U.S. at 394-95 (allowing a church to screen religious films on a public school campus); *Mergens*, 496 U.S. at 249-53 (plurality op.) (allowing students to form a religious club with a faculty

monitor); *Widmar v. Vincent*, 454 U.S. 263, 270-75 (1981) (allowing student groups to use university facilities for worship). And this Court has been abundantly clear that "schools do not endorse everything they fail to censor." *Mergens*, 496 U.S. at 250 (plurality op.).

Nor do other government institutions endorse an employee's private speech by failing to censor it. Importantly, "citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 573 U.S. 228, 231 (2014). Individuals who engage in expression outside of their official job duties may not "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). *Cf. Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) ("[A] citizen who works for the government is nonetheless a citizen."). And since "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the First Amendment applies to brief and peaceful private religious expression in public schools too. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

Any concern that such private religious speech amounts to an Establishment Clause violation is misplaced. In military cemeteries, for example, the "privately selected religious symbols on individual graves" which "are best understood as the private speech of each veteran" are permissible. Doug Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-*

Modernism, 61 Case W. Res. L. Rev. 1211, 1242 (2011). As are "Sectarian identifications on markers in Arlington Cemetery," *Pleasant Grove City v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring in judgment), which are "linked to, and sho[w] respect for, the individual honoree's faith and beliefs." *Salazar v. Buono*, 559 U.S. 700, 749, n.8 (2010) (Stevens, J., dissenting). Despite being displayed on government property, they are not "government speech at all," *Summum*, 555 U.S. at 487 (Souter, J., concurring in judgment), and "[t]hey do not suggest governmental endorsement of those faith and beliefs." *Am. Legion*, 139 S. Ct. at 2112 (Ginsburg, J., dissenting).

Even elected and other high public officials may speak publicly without violating the First Amendment. *See* Esbeck, *supra*, 13 n.80. "In America, pronouncements by elected officials that interweave patriotism and religion have a long and venerable tradition." *Id.* "Familiar examples" include "presidential speeches that call upon God's providence as the nation faces some new challenge or adventure or addresses that conclude with 'may God bless America,' celebrating Thanksgiving as a day for collective acknowledge[ment]" of God's "good favor, and the practice started by George Washington of taking the presidential oath of office with the added 'so help me God.'" *Id.* (cleaned up). *See also Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952) (approving of government acknowledgment of religion such as "[p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths," as well as

"all other references to the Almighty that run through our laws, our public rituals, [and] our ceremonies" and "the supplication with which the Court opens each session: 'God save the United States and this Honorable Court'"); *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring) (same); *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983) (approving prayer by chaplain at beginning of state legislative day); *Town of Greece v. Galloway,* 572 U.S. 565, 570 (2014) (upholding practice of beginning municipal meetings with a prayer delivered by various local clergy).

Indeed, private religious speech on government property need not always ring of government endorsement of religion. Weeks ago, for example, the First Lady tweeted the White House display of a Bible verse prominently displayed on the White House lawn. *See* @FLOTUS, Twitter (Feb. 14, 2022), bit.ly/3Ht2O1p ("Three things shall last forever—faith, hope, and love—and the greatest of these is love. 1 Corinthians 13:13."). The mere mention of religion on government property does not transform it into government speech and violate the Establishment Clause.

In light of this history, there is no reasonable argument that Coach Kennedy's decision to say a short, private post-game prayer by himself (or with others who joined voluntarily) violated the Establishment Clause simply because he was in view of those in attendance. Coach Kennedy's religious beliefs compel him to "give thanks through prayer" at the conclusion of each game "for what the players had accomplished" and "for the opportunity to be part of

their lives through football." Pet. Br. 4-5; Pet.App.3; JA168. Thus after games were over and players gathered to shake hands, Kennedy felt called to pause, kneel, and "offer a brief, quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition." Pet. Br. 4-5; JA148-49; Pet.App.3-4. His prayers typically lasted "thirty seconds" or less. Pet.App.4.

Such prayers are "clearly personal and do[] not convey the impression that the government is endorsing [them]." *Warnock*, 380 F.3d at 1082. Thus "the mere fact that [they] occur[ed] in a government setting does not render [them] unconstitutional." *Id.*; *see id.* (because principal's religious effects displayed in his office were "constitutionally protected under the free speech and free exercise clauses," the court "c[ould not] hold that they simultaneously violate the establishment clause"); *cf. Lamb's Chapel,* 508 U.S. at 394-95.

B. The Establishment Clause cannot be violated by a fear that someone will misperceive private religious speech as the government's speech.

As the district conceded below, the "sole reason" it suspended Coach Kennedy was a fear that failing to silence his private prayer could be perceived as an endorsement of religion in violation of the Establishment Clause. Pet.App.140; Pet.App.23. That fear was objectively unfounded. And it cannot justify the district's actions.

As the Petitioner explains, the district's "fear of a mistaken inference of endorsement [wa]s largely self-

imposed." App. Br. 40 (quoting *Mergens*, 496 U.S. at 251) (plurality op.)). But "[t]o the extent a school makes clear that its recognition of [private religious speech] is not an endorsement of the views" of the speaker, "students will reasonably understand" that the school's recognition of that speech "evinces neutrality toward, rather than endorsement of, religious speech." *Mergens*, 496 U.S. at 251 (plurality op.); *see also Capitol Square*, 515 U.S. at 765 (reasonable observers are member of the community and not "uninformed … outsider[s]"). Here, the district went to great lengths "to *disassociate* itself from" Kennedy's religious exercise, *Rosenberger*, 515 U.S. at 841. As a result, there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed," *Good News Club*, 533 U.S. at 113 (quoting *Lamb's Chapel*, 508 U.S. at 395), or that it sought to covertly "aid[] a religious cause," *Rosenberger*, 515 U.S. at 840.

The district repeatedly and publicly disapproved of Coach Kennedy's postgame, on-field prayers—clarifying he was not speaking on its behalf. Pet.App.7-9. In fact, the story initially became known because of a post Coach Kennedy made on Facebook, which resulted in the district receiving a great deal of condemnation. *Id.* at 5. It nonetheless adopted a policy preventing staff from encouraging students to pray. *Id.* And it sent Coach Kennedy several letters stating its displeasure with his post-game prayers. *Id.* at 10. On top of that, major media outlets outlet reported that Coach Kennedy continued to pray *in defiance* of the district order. *Id.* at 8. Indeed, the public largely saw the district's handling of Kennedy's prayers as "hostility to religion" and many community members

thus "expressed solidarity" with Kennedy. App. Br. 40-41.

This all shows that the public (at least any "informed" and "reasonable observer") was well aware of the district's attitude towards Coach Kennedy's prayers. Indeed, the district's public opposition removed any possible "perception of endorsement" from Coach Kennedy's prayers. *Id.*; *see also* Pet.App.108 (Ikuta, J., dissenting from denial of rehearing *en banc*). Given this history, no "objective observer" could possibly believe the school supported this speech. *See generally Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Good News Club*, 533 U.S. at 119 (stating the observer would be "aware of the history and context of the community and forum in which the religious speech takes place"). As Judge Ikuta recognized in dissent, any "concern that Kennedy's religious activities would be attributed to the district is simply not plausible." Pet.App.108 (Ikuta, J.); *see also* Pet.App.129 (Collins, J., dissenting from denial of rehearing en banc). The district thus "ha[d] no valid Establishment Clause interest" at all, *Good News Club*, 533 U.S. at 113, let alone one that would justify the extreme measures it took, *see Warnock*, 380 F.3d at 1083 ("[W]e cannot say that the first amendment requires a more draconian response by school officials to ensure that the government distances itself from [an individual's challenged] actions.").

Despite all this, the Ninth Circuit perceived an endorsement problem, because in its view, anyone "familiar with the history of Kennedy's on-field religious activity, coupled with his efforts to generate

publicity in order to gain approval of those on-field religious activities," would "unquestionably" view the "allowance" of his religious exercise as "'stamped'" with the district's "'seal of approval.'" Pet. Br. 41; Pet.App.1-2, 18-19. But, as the record demonstrates, Kennedy was not asking for endorsement or "religious favoritism." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 709-10 (1994). He only "asked his employer to do *nothing*—simply to tolerate the brief, quiet prayer of one man." Pet.App.99 (O'Scannlain, J., dissenting from denial of rehearing en banc). And a "state does not establish a religion by leaving it alone." Esbeck, *supra*, 4.

Nor does the state establish a religion merely by "allow[ing] religion in schools." Pet.App.123 (Nelson, J., dissenting from denial of rehearing en banc). History confirms as much. Schools have allowed for expression of religion from the start. One of Congress's earliest statutes made clear that "[r]eligion, morality, and knowledge, being necessary to ... schools and the means of education shall forever be encouraged." *Id.* (quoting the Northwest Ordinance of 1787, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52.l). Additionally, a detailed analysis from founding era texts revealed that there was little to no 18th-century concerns that "prayers or religious practices in public schools" amounted to Establishment Clause violations. Stephanie H. Barclay, Brady Earley, Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 Ariz. L. Rev. 505, 509 (2019). Instead, as explained, there remains "play in the joints" for religious expressions, especially for brief, personal displays of faith. *Espinoza,* 140 S. Ct. at 2254.

Given this history, fears that someone might, in some matter, perceive toleration of religious expression to violate the Establishment Clause simply fall flat. And such fears cannot justify the suppression of private religious speech.

II. Using unfounded Establishment Clause concerns to ban religious expression—as the district did here—is unconstitutional content- and viewpoint-based discrimination.

Although "a State has a compelling interest in not committing *actual* Establishment Clause violations," it has no such interest in not committing *imaginary* ones. *Locke v. Davey*, 540 U.S. 712, 730 n.2, (2004) (Scalia, J., dissenting) (citing *Widmar*, 454 U.S. at 271). Indeed, this Court "ha[s] never inferred from this principle that a State has a constitutionally sufficient interest in discriminating against religion in whatever other context it pleases, so long as it claims some connection, however attenuated, to establishment concerns." *Id.* To the contrary, this Court has held that where there is "no valid Establishment Clause interest," the Establishment Clause cannot justify content- and viewpoint-based discrimination. *See Good News Club,* 533 U.S. at 113-14.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828. Nor can it discriminate based on viewpoint. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) ("[V]iewpoint discrimination is an 'egregious form of content discrimination.'"). The district lost sight of this when it punished Kennedy for his brief, post-game prayers. According to the district, it suspended Kennedy from

his position because of "the risk of constitutional liability associated with Kennedy's religious conduct." Pet.App.140. Indeed, that was the "sole reason" the district suspended him. *Id.*

That is, simply, a content- and viewpoint-based restriction on speech. The district regulated Kennedy's speech "based on its communicative content." *Nat'l Inst. Of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)); *Reno v. ACLU*, 521 U.S. 844, 868 (1997). The district even "concede[d]" that its policy preventing Kennedy from his post-game prayers "is not neutral and generally applicable." Pet.App.23. Indeed, the district punished Coach Kennedy specifically "*because* [his conduct] was religious." *Id.* at 188; *see id.* at 23 ("[T]he protections of the Free Exercise Clause pertain if the law at issue … regulates … conduct because it is *undertaken for religious reasons*." (emphasis added)).

The district primarily feared that others might *possibly* view Kennedy's prayer as endorsed by the school. But restrictions because of the "impact that speech has on its listeners ... is the essence of content-based regulation." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 811-12 (2000) (citation and quotations omitted). As a result, the district's content-based punishment of Kennedy is "presumptively unconstitutional" and can stand only if the district proves it is "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. The district has failed to offer a compelling interest for punishing Kennedy's speech outside of preventing an Establishment Clause violation. But, as explained,

any interest the district may have in avoiding such a violation is non-existent here. *Good News Club*, 533 U.S. at 113-14.

Nor did such an interest exist in *Lamb's Chapel*. There, a school district denied a Christian group permission to play faith-based movies within school facilities. 508 U.S. at 388-89. The Court reasoned that the school's "posited fears of an Establishment Clause violation [were] unfounded." *Id.* at 395. The Court analyzed several factors: the religious activity "would not have been during school hours;" the activity was not "sponsored by the school;" and the conduct was "open to the public, not just to church members." Taken together, the Court explained, no one could plausibly claim that the school was the religious speaker. *Id.* at 387. Because there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed," the Court held that the school engaged in viewpoint discrimination. *Id.* at 395.

So too with Coach Kennedy. His prayers after football games were outside school hours, after the completion of the football games. And the school district expressly distanced itself from them. *See* Part I. B.

In the end, the district may not "suppress disfavored speech," *Reed*, 576 U.S. at 167, in the name of avoiding an imaginary Establishment Clause violation. If left to stand, the decision below will essentially require schools to suppress any religious speech from their employee because, under its logic, a public school that refuses to "search for and … eliminate … religious speech" will "face liability under

the Establishment Clause." Pet.App.105 (O'Scannlain, J.).

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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