No. 21-418

In the Supreme Court of the United States

JOSEPH A. KENNEDY, *Petitioner,*

v.

BREMERTON SCHOOL DISTRICT

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTRODUCTION AND INTEREST OF *AMICUS*[1]

Many religious traditions require or encourage adherents to express their commitment to their faith outwardly. Often, that expression manifests through religious clothing—a Muslim might wear a hijab, a Jew a yarmulke, or a Christian a cross. For others, religious belief is expressed through "adhering to shaving or hair length observances," such as "Sikh uncut hair and beard, Rastafarian dreadlocks, or Jewish peyes."[2] And some beliefs, like Petitioner Kennedy's here, "compel" a person to "give thanks [to God] through prayer" at specific times. Pet. Br. 4.

Amicus Protect the First Foundation (PT1) agrees with Kennedy that the First Amendment protects those practices "twice over," both through the Free Exercise Clause and through the Free Speech Clause. *Id.* at 36. PT1, a nonprofit, nonpartisan organization that advocates for First Amendment rights in all applicable arenas—including public employment—writes separately to emphasize two additional reasons why the school district's approach to Kennedy's prayer is wrong and should be held unconstitutional. *First*, contrary to the district's argument below, it is factually wrong—and contrary to common sense—to attribute a public employee's personal expression of individual faith to the government, even if that expression occurs

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[1] All parties have consented to the filing of this brief. No counsel for any party or any other person or entity aside from *amicus curiae*, its members, and its counsel authored the brief or made any monetary contribution toward its preparation.

[2] EEOC, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities* (Mar. 6, 2014), https://tinyurl.com/2p86xk5x.

on the job. *Second*, the decision below is particularly harmful because it allows public employers to impose a *de facto* religious test in violation of Article VI's No Religious Test Clause. If left standing, that decision will thus limit public employment to members of favored religions that demand no visible, public displays of faith, while denying employment to those whose exercise of religion needs to be overt and visible to others.

STATEMENT

Petitioner Joseph Kennedy served as a high school football coach for Respondent Bremerton School District until the District suspended him for saying thirty-second prayers on the football field after games. Pet. App. 3-5.

Kennedy is a devout Christian whose religious beliefs compel him to offer prayers of gratitude on the field, immediately after games. *Id.* at 4. Initially, Kennedy prayed alone; later, team members asked to join him. *Id.* at 3-4. Although he invited other coaches to join him, Br. in Opp. 7, Kennedy did not compel anyone to pray with him, confirming that the decisions of the students who asked to join him were voluntary. Pet. App. 4. Sometimes, Kennedy gave religious motivational speeches to those who prayed with him. Br. in Opp. 3.

For years, Kennedy prayed without anyone objecting. Pet. App. 5. Indeed, those observing the post-game prayers seemingly did not even know what was being said. Pet. App. 139-140, 182 (explaining that the prayer which led to Kennedy's administrative leave was conducted as he knelt alone).

Things changed about seven years into Kennedy's employment. After learning that Kennedy's postgame meetings were prayers, the district told Kennedy he could only pray on the field if his prayer was not "outwardly discernable" or when no students were around. Br. In Opp. 4; Pet. App. 6. Kennedy ceased giving speeches but continued to kneel and quietly pray after games. Pet. App. 10-11. In response, the district placed him on leave. Br. in Opp. 10.

SUMMARY OF ARGUMENT

I. The district's approach to Kennedy's on-field prayer ignores the reality that ours is a nation of religious pluralism. And the inevitable result of that pluralism is that people of different faiths exercise their religion in myriad ways.

One common way that people of faith express their religious conviction is through expressing it outwardly. Many show their beliefs by wearing religious garments or by making visible grooming choices, such as by growing out their hair. Others do so by praying. No matter how a person's religion instructs her to worship, the resulting religious expression constitutes a personal exercise of religion reflecting a deeply felt obligation of faith.

Such religious expression, moreover, does not suddenly become government speech just because it occurs at a place of public employment. A Jewish person who teaches public school students while wearing a yarmulke is doing nothing different in kind than a teacher or a coach privately praying in the view of his students or others. Both religious activities are visible. Both send a message of personal faith. And both are attributable only to the person participating, not to his

employer. Put differently, as Kennedy emphasizes, "schools do not endorse everything they fail to censor." *Bd. of Educ. of Westside Cmty. Sch.* v. *Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.).

II. A decision attributing an employee's private religious expression to that person's public employer, and thereby making it subject to prohibition, is not only factually specious, but also constitutionally impermissible because it imposes a forbidden religious test for public service. And, unlike the difficult questions this Court will be forced to answer under the Free Speech and Free Exercise Clauses because of the malleable tiers of scrutiny that this Court employs in those contexts, the application of the No Religious Test Clause is straightforward: Its clear text directly addresses and prohibits the condition on government employment that, if affirmed, the decision below would allow.

Governments, of course, are not able to do indirectly what they cannot do directly. And, just as a government is forbidden from "forc[ing] a person to profess a belief or disbelief in any religion," *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961) (cleaned up), it is also forbidden, absent some showing of concrete harm, from punishing individuals for religiously required speech once they have accepted employment.

ARGUMENT

I. Many People Exercise their Religion Through Outward Expressions of Faith that Cannot Fairly Be Attributed to their Employers.

Proper analysis of the issues in this case must begin with a recognition that the United States is "a cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961). And, unsurprisingly, people belonging to that "enormous variety of religions" express and exercise their religious beliefs in many ways. *Edwards* v. *Aguillard*, 482 U.S. 578, 607 n.6 (1987) (Powell, J., concurring). Some engage in daily outward expressions of faith that are visible to others and may occur at home, at work, at their religious institutions, and even on government property. But individualized expressions of faith that no one is compelled to join should be treated as private expressions attributable to the individual alone.

1. The practices of even a small sample of faiths confirm how varied outward religious expression can be.

Islam, for example, prescribes a wide variety of physical expressions of faith. In *EEOC* v. *Abercrombie & Fitch Stores, Inc*, this Court considered the Islamic requirement that women wear a headscarf. 575 U.S. 768, 770 (2015). And many Muslim men grow beards, as required by certain teachings of Islam. *Holt* v. *Hobbs*, 574 U.S. 352, 355-356 (2015).

Sikhism likewise expects its followers to outwardly express certain tenets of the faith. Sikh men wear turbans for a variety of religious reasons and have uncut

hair known as "kesh." *Singh* v. *Gonzales*, 487 F.3d 1056, 1059 (7th Cir. 2007). Many Sikhs also wear a kara, which is a steel arm bracelet. *Ibid*. These practices are integral to the Sikh religious experience.

Various strains of Judaism also place heavy emphasis on symbolism and public manifestations of faith. Orthodox Jews are known for growing peyes, or sidelocks—long extensions of hair on the side of the head.[3] Kippahs (prayer caps) and tallits (prayer shawls) are also frequently worn by Jewish men.[4] In the Nazirite tradition, a sub-tradition within the Jewish faith, men are forbidden from shaving or cutting their hair at all. See *Grayson* v. *Schuler*, 666 F.3d 450, 454 (7th Cir. 2012).

Religious expression in Judaism, moreover, is not always as passive as wearing religious garb. The Old Testament teaches the importance of thanking God after meals, a practice known as the birkat hamazon.[5] Both the audible expression of birkat hamazon and the dress and grooming standards followed by certain Jewish people are outward expressions of faith that manifest themselves in public spaces, including the workplace.

Women followers of Hinduism similarly feel compelled for religious reasons to express their faith through religious garb. For example, they often wear

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[3] EEOC, *Religious Garb*, supra note 2.

[4] Mosaic Law Congregation, *Origin of Kippah and Tallit: Head Covering and Prayer Shawl of the Jew*, https://tinyurl.com/yckd7fht.

[5] Kate Palley, *What is Birkat Hamazon, or Benching*, My Jewish Learning, https://tinyurl.com/mr2t897r.

a bindi—a colored dot worn on the forehead—symbolizing "piety as well as serving as a constant reminder to keep God at the center of one's thoughts."[6]

Buddhism likewise incorporates a complex collection of rites and practices that often manifest themselves in public ways. For example, to become a Buddhist monk, the applicant first grows out his facial hair and beard, which he eventually shaves during the ceremony to become a monk.[7] Many male and female Buddhists are compelled by their faith to wear mala beads—multicolored beads worn around wrists or ankles that assist with meditation and remind adherents to pray. See *Rountree* v. *Aldridge*, No. 7:18CV00567, 2020 WL 1695495, at *3 (W.D. Va. Apr. 7, 2020).

Similarly, Kemetecism, a rebirth of an ancient Egyptian religion, requires its followers to receive distinctive tattoos. This is illustrated in *EEOC* v. *Red Robin Gourmet Burgers, Inc.*, No. C04-1291JLR, 2005 WL 2090677, at *1 (W.D. Wash. Aug. 29, 2005), in which Edward Rangel, a Kemetic, had received tattoos in Coptic around his wrists. *Ibid.* His faith taught not only that those tattoos were religiously required, but also that covering them would be a sin. *Ibid.*

Other minority religions also retain distinctive, outward manifestations of their faiths. For example, some Native Americans wear eagle feathers to show a

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[6] Shuvi Jha, *The Purpose of the Bindi*, Hindu American Foundation (June 5, 2018), https://tinyurl.com/3rxb4pyc.

[7] Encyclopedia Britannica, *Popular Religious Practices*, https://tinyurl.com/4ajs628e (last visited Mar. 1, 2022).

connection with nature.[8] And Rastafarians often grow dreadlocks as an expression of their faith.[9]

2. Christianity—Kennedy's faith—has an equally long history of expressive practices. Catholicism and many Protestant traditions encourage the wearing of jewelry in the shape of a cross, a central part of the Christian religion.[10] Members of some Christian groups mark their foreheads with crosses made of ash on Ash Wednesday.[11] Some Protestants feel strongly about keeping a Bible on their desks during the workday. *Berry* v. *Dep't of Soc. Servs.,* 447 F.3d 642, 655 (9th Cir. 2006).

And, of course, some Christians feel compelled to take a knee,[12] make the sign of the Cross,[13] or offer a

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[8] News On 6, *Student Loses Bid to Wear Eagle Feather on Graduation Cap* (May 21, 2015, 3:27 PM), https://tinyurl.com/zbx2v44p.

[9] EEOC, *Religious Garb*, supra note 2.

[10] *Id.*

[11] Dwight Adams, *Why Christians wear ashes for Ash Wednesday and give up their favorite things for Lent*, IndyStar (Mar. 5, 2019, 6:00 AM), https://tinyurl.com/5n7vb5sj.

[12] Josh Peter, *Tim Tebow not happy about 'Tebowing' being brought into national anthem protests debate*, USA Today (June 8, 2018, 5:57 PM ET), https://tinyurl.com/yd82pnap ("It was never something I did to take away from somebody else. It was just something I did with a personal relationship with my God.").

[13] Anglican Pastor, *The Sign of the Cross: What It Is and Why It Matters*, Anglican Compass (Aug. 22, 2018), https://tinyurl.com/ycx2fzc2 ("The sign of the cross is a prayer in itself. It is often accompanied by a prayer, either aloud or in one's own mind and heart.").

quick prayer of thanks at certain times.[14] Many Christians see these expressions of their religion as important to living a life of faith. See, *e.g.,* 1 Timothy 2:8 (New Int'l Version) ("I want the men *everywhere* to pray, lifting up holy hands without anger or disputing."(emphasis added)); Luke 18:1 (New Int'l Version) ("Jesus told his disciples a parable to show them that they should *always* pray and not give up." (emphasis added)).

3. Properly understood, these many outward expressions of faith are attributable only to those that make them. To reach any other conclusion would be, as Judge Ho put it in a different context, to "misunderstand the entire nature of religious conviction at its most foundational level." *Sambrano* v. *United Airlines, Inc.*, 19 F.4th 839, 842 (5th Cir. 2021) (Ho, J., dissenting). To people of faith, their "[f]aith is as deeply important as it is deeply personal[.]" *Joyner* v. *Forsyth Cnty., N.C.*, 653 F.3d 341, 349 (4th Cir. 2011).

Because of the well-understood personal and individual nature of expressions of faith, it would be wrong as a factual matter to strip such expressions of their individual significance by attributing them to a person's employer. No one, for example, would ever view an Abercrombie employee's decision to wear a headscarf at work as *Abercrombie*'s endorsement of Islam. See *Abercrombie*, 575 U.S. at 770-771. And, even though wearing a turban or a kara to work would

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[14] Elder David A. Bednar, *Pray Always*, The Church of Jesus Christ of Latter-day Saints (Nov. 2008), https://tinyurl.com/2r52pz49 ("Let me recommend that periodically you and I offer a prayer in which we only give thanks and express gratitude. Ask for nothing; simply let our souls rejoice and strive to communicate appreciation with all the energy of our hearts.").

necessarily cause others to see those religious garments and perceive the message of faith they portray, it would be unreasonable to suggest that it's the employer, rather than the employee, that is expressing that message. Even at work, individual expressions of faith remain precisely that—the expression of the individual, not the employer.

The same is true for more vocal religious expressions, such as Kennedy's quiet, 30-second post-game prayer. JA148-149; Pet. App. 3-4. As Kennedy explains in his brief, his religious beliefs compel him to "give thanks through prayer" at the end of every football game. Pet. Br. 4. That prayer, offered on bended knee, is "brief, quiet," and offered in a spirit of "thanksgiving for player safety, sportsmanship, and spirited competition." *Ibid.* He does not pray in the name of his employer, does not attribute his thanks to the school, and, like football players taking a bended knee in the endzone after a touchdown, is self-evidently "speaking" for himself. Sometimes—foreclosing any suggestion that Kennedy coerced his students to join him—he even prayed by himself. Pet. Br. 5 (citing JA169).

On those facts, his conduct is more comparable to saying a pre-meal grace during a lunchbreak while within earshot of his students than it is to injecting or proselytizing his beliefs into his official duties.

Indeed, to consider Kennedy's private religious expression government speech—particularly given the school district's repeated attempts to distance themselves from it, Pet. Br. 7-8 (citing JA46-47)—is to misattribute and cheapen his speech. Where, as here, a public employee is not "inject[ing] prayer or proselytization into their official duties," *id.* at 2, but is instead

acting privately—even if visibly—the speech is properly considered private.

II. Banning Overt Expressions of Faith by Public Employees on the Job Would Violate the No Religious Test Clause

As this case shows, a decision to classify common outward individual expressions of religious belief as government speech seriously harms the First Amendment rights of public employees, including teachers. See Pet. Br. 23-35. But classifying individual expressions of faith as government speech that may be the basis for firing a government employee also violates Article VI of the Constitution because it effectively imposes a religious test on civil servants.

Article VI provides that officers of state and federal government "shall be bound by oath or affirmation to support" the Constitution, but emphasizes that, notwithstanding that requirement, "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, cl. 3 (capitalization modernized). As shown below, the history of this Clause shows that it was designed to prevent the kinds of harm at issue in this case. Moreover, conditioning continued employment on the nonprofession of religious belief imposes precisely such a religious test: Individuals may not hold an office or position of public trust if they adhere to a faith requiring some disfavored outward expression of religious belief.

A. The history of the No Religious Test Clause shows that it was designed to prevent the kind of harm at issue here.

Since its inclusion in the Constitution, the No Religious Test Clause has been addressed so infrequently

that one scholar has deemed it "forgotten."[15] While the dearth of cases may be due to the Free Exercise and the Establishment Clauses' covering much of the ground that might otherwise trigger the No Religious Test Clause, it still provides a useful textual anchor for religion cases. Whatever one thinks of the unconstitutional-conditions doctrine, or the once popular rights/privileges distinction, the No Religious Test Clause is an express textual prohibition on conditioning public employment on adherence to "acceptable" religious views or practices—and therefore, at a minimum, it should inform the Court's analysis of the First Amendment issues presented here.

This Court has had few opportunities to address the No Religious Test Clause. Only once has the Court mentioned the Clause in non-*dicta*—when a plurality held that requiring labor leaders to swear they did not belong to the Communist Party was not a "religious test." *Am. Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 414-415 (1950). Other than *Douds*, "no judicial decision has rested upon the clause."[16] *Cf. Torcaso* v. *Watkins*, 367 U.S. 488, 490-496 (1961) (observing a law requiring notaries to declare belief in God "sets up a religious test" but ultimately deciding the case on First Amendment grounds). Even when one turns to other

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[15] Daniel L. Dreisbach, *The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban*, 38 J. Church & St. 261, 261-262 (1996).

[16] Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 Case W. Res. L. Rev. 674, 714 (1987).

courts, "[j]udicial interpretations of the No Religious Test Clause are virtually nonexistent."[17]

Given the dearth of precedent interpreting the No Religious Test Clause, it is worth briefly revisiting the history of that Clause and the rights it was designed to protect. That history shows that the Clause was designed to protect against just the type of harm at issue here—subtly (or not-so-subtly) coercing religious choices.

1. Religious tests "lay claim to great antiquity"—going back at least as far as the Old Testament story of Daniel in the Lion's Den.[18]

Religious tests also pervaded English history. For example, the Test Act of 1673 restricted public office to those who took an oath disavowing transubstantiation—thereby preventing the service of Roman Catholics.[19] During Oliver Cromwell's reign, Catholics and atheists were barred from serving in Parliament.[20]

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[17] Note, *An Originalist Analysis of the No Religious Test Clause*, 120 Harv. L. Rev. 1649, 1660 (2007).

[18] William Stephens, *A Letter to the Lords upon the Matter of the Occasional Bill* 2 (1704), https://tinyurl.com/6te7e2rd; see also Daniel 6:4-7 (New Int'l Version) (telling about certain advisors to Darius who, seeking to "find grounds for charges against Daniel," convinced Darius to "issue an edict and enforce the decree that anyone who prays to any god * * * shall be thrown into the lions' den").

[19] Test Act of 1673, 25 Car. 2 c. 2, § 3, *in* 5 Statutes of the Realm 782-783 (John Raithby ed. 1819); Test Act of 1678, 30 Car. 2 c. 2 (st. 2), *in* 5 Statutes of the Realm 894-896 (John Raithby ed. 1819) (extending the earlier Test Act).

[20] The Instrument of Government arts. XV-XVII (1653) (restricting seats to "such (and no other than such) as are persons of

Similar tests continued even after the Act of Toleration. Indeed, that Act itself restricted public office to Anglicans and required everyone to swear "that no foreign prince, person, [or] state * * * hath or ought to have, any power * * *, superiority * * *, or authority ecclesiastical or spiritual within this realm"[21]—an oath clearly targeted at Catholics.

2. The early states continued to implement religious tests. Indeed, nearly all of the original states had one before the Founding.[22]

Although the prototypical religious test may have required an affirmation of belief (or nonbelief), conduct- and status-based conditions were also understood historically to be religious tests.[23]

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known integrity, fearing God" and who do not "profess the Roman Catholic religion").

[21] Act of Toleration of 1689, W. & M. c. 18, art. XIII, *in* I Protestant Nonconformist Texts 397-400 (R. Tudor Jones ed., 2007).

[22] Dreisbach, *supra* n.17, at 265-268 (collecting religious tests from every original state except Virginia); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1474 (1990) (calling the No Religious Test Clause a "dramatic departure from the prevailing practice in the states").

[23] Nathan J. Ristuccia, *Enlightening Sacrament: English History and the Religious Test Clause* 16 (working paper, May 27, 2021), https://tinyurl.com/2p9xsxpp (noting religious tests "discuss ritual practice as much, or more, than beliefs"); see Test Act of 1673, 25 Car. 2 c. 2, § 1, *in* 5 Statutes of the Realm 782-783 (John Raithby ed. 1819) ("And the * * * officers * * * shall also receive the Sacrament of the Lord's Supper according to the usage of the Church of England.") (spelling and grammar modernized); *Id.* § 3("[E]very person * * * that * * * shall neglect or refuse to take the said oaths and Sacrament * * * shall be ipso facto

3. During the debates over the ratification of the Constitution, Edmund Randolph emphasized that the Clause would ensure that officers "are not bound to support one mode of worship, or to adhere to one particular sect" but instead insured that "all sects [were] on the same footing."[24] Oliver Ellsworth similarly defined a religious test as "an act to be done, or profession to be made, relating to religion * * * for the purpose of determining whether [the actor's] religious opinions are such that he is admissible to a public office."[25]

Thus, as a matter of original meaning, the Clause ensured that all have a right to seek public employment *and* profess their religious beliefs—regardless of what those beliefs were, or what "mode of worship" they employed. The Clause thus protected against the

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adjudged uncapable and disabled in law * * * to have occupy or enjoy * * * [public] offices.") (spelling and grammar modernized). See also Pa. Const., Decl. of Rights, art. II (1776) (preventing, as part of a ban on religious tests, disabilities placed "on account of his religious sentiments or particular mode of religious worship"); N.C. Const. art. XXXII (1776) (disqualifying those holding "religious principles incompatible with the freedom and safety of the State").

[24] Edmund Randolph, Virginia Ratifying Convention (June 10, 1788), *in* 4 Founders' Constitution 644 (Phillip B. Kurland & Ralph Lerner eds., 1987); see also Debate in North Carolina Ratifying Convention (July 30, 1788) (statement of James Iredell), *in* 5 Founders' Constitution 89 (Phillip B. Kurland & Ralph Lerner eds., 1987) (giving, as an example of a religious test, a law requiring officers to "tak[e] the sacrament according to the rites of the Church").

[25] Oliver Ellsworth, Landholder, No. 7 (Dec. 17, 1787), *in* 4 The Founders' Constitution 640 (Phillip B. Kurland & Ralph Lerner eds., 1987).

use of public offices to create coercion, either positive or negative, in matters of religious belief and practice.

Here, of course, it is the negative coercion encompassed in the district's policy in this case that makes it objectionable and even offensive.[26] As a result, "Kennedy temporarily stopped praying on the field after football games," causing him to "feel dirty" for breaking "his commitment to God." Pet. App. 6 The district might not have required Kennedy to deny his religious beliefs directly. But by making him "wrestle with self-doubt" and "question[] whether he has lived up to the calling of his faith," *Sambrano*, 19 F.4th at 842 (Ho, J., dissenting), the district imposed on him a choice that the No Religious Test Clause was designed to prevent.

B. Converting protected individual religious expression into regulable government speech imposes a religious test for government employment.

The implications of the Clause's history for this case are confirmed by its text. It simply provides that "no religious test" shall "ever" be required as a qualification for federal office or positions of public trust. U.S. Const. art. VI, cl. 3. And the right granted by the Clause is so fundamental that it is properly

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[26] See Pet. App. 6 (exploring how the district "counseled" Kennedy that "[i]f students engage in religious activity, school staff may not take any action likely to be perceived by a reasonable observer, who is aware of the history and context of such activity at BHS, as endorsement of that activity"); see also *ibid.* (continuing that "to avoid the perception of endorsement," any "religious activity, including prayer" should "either be non-demonstrative (*i.e.*, not outwardly discernible as religious activity)" or "should occur while students are not engaging in such conduct").

incorporated by the Fourteenth Amendment as against the States.[27]

To determine that government action violates the Clause, moreover, the Court need only satisfy itself that (1) the position sought is an office or position of public trust; and (2) the limitation qualifies as a "religious test."

1. There can be little doubt that, as courts around the country have held, public-school teachers hold a position of "public trust." *Munroe* v. *Cent. Bucks Sch. Dist.*, 805 F.3d 454, 475 (3d Cir. 2015), *as amended* (Oct. 25, 2019) ("The position of public school teacher requires a degree of public trust not found in many other positions of public employment." (cleaned up)); *Kirkland* v. *St. Vrain Valley Sch. Dist. No. Re-1J*, 464 F.3d 1182, 1194 (10th Cir. 2006); *Mustafa* v. *Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1177 (9th Cir. 1998);

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[27] Although this Court has never directly ruled on incorporation of the No Religious Test Clause, see *Torcaso* v. *Watkins*, 367 U.S. 488, 489 n.1 (1961), the Clause's protection is so "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition," *Timbs* v. *Indiana*, 139 S. Ct. 682, 687 (2019), that there is no reason to doubt the propriety of incorporation in the appropriate case. Alternatively, the right to be free from Religious Tests should be deemed a "privilege[] or immunit[y] of citizenship" that the States may not abridge. U.S. Const. amdt. 14 § 1. See *McDonald* v. *City of Chicago, Ill.*, 561 U.S. 742, 806-810 (2010) (Thomas, J., concurring in part and in the judgment); *Timbs*, 139 S. Ct. at 691-693 (Thomas, J., concurring in the judgment); *id.* at 691 (Gorsuch, J., concurring). But even if the No Religious Test Clause is not itself formally applied to the States, the dictates of that Clause—the only provision addressing religion in the original Constitution—should at very least inform the Court's interpretation of the First Amendment. See generally *McDaniel* v. *Paty*, 435 U.S. 618, 632 (1978) (Brennan, J., concurring in judgment).

United States v. *Booth*, 996 F.2d 1395, 1396 (2d Cir. 1993). That conclusion flows directly from "the fact that schools at times stand *in loco parentis*, *i.e.*, in the place of parents." *Mahanoy Area Sch. Dist.* v. *B. L. by & through Levy*, 141 S. Ct. 2038, 2045 (2021).

2. Moreover, limiting public employment to persons from non-expressive faiths, or firing them if they refuse to abandon the "mode of worship" of their faith, likewise seems a straight-forward "religious test." While there is little caselaw in this area, Justice Brennan addressed the issue in the Free Exercise context and concluded that the First Amendment forbids the conditioning of eligibility for office on a "religious classification." *McDaniel* v. *Paty*, 435 U.S. 618, 632 (1978) (Brennan, J., concurring in judgment). He explained that a disability placed on those who "exhibit a defined level of intensity of involvement in protected religious activity * * * as much imposes a test for office based on religious conviction as one based on denominational preference." *Ibid.* Thus, he concluded, "[a] law which limits political participation to those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualifies Catholics, or Jews, or Protestants." *Ibid.*; see also *id.* at 641 (noting government "may not remove [officeholders] from office merely for making public statements regarding religion").

What Justice Brennan identified as a Free Exercise principle is also the heart of the No Religious Test Clause: "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally." *Ibid.*

3. Guided by these principles, there can be no question that, if a public employer were to impose an express requirement that its employees forsake or adopt a certain religious belief as a condition of employment, such a policy would violate the No Religious Test Clause. A requirement that public employees forsake the outward expression of belief they deem required by their religion, or else lose their position of public trust, is no different and no less a forbidden religious test.

That conclusion is reinforced by this Court's repeated caution that "constitutional guarantees, so carefully safeguarded against direct assault, [should not be] open to destruction by the indirect, but no less effective, process of requiring a surrender[.]" *Frost* v. *R.R. Comm'n of State of Cal.*, 271 U.S. 583, 593 (1926); *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013) ("Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent."). To the person of faith who is told they are forbidden from engaging in required religious expression, it makes no difference whether the prohibition serves as a barrier to entry or as a continued condition of employment, *i.e.*, a "back-end" religious test. Such a condition on public employment undoubtedly triggers, and fails, First Amendment scrutiny.

What is added to that analysis by the Religious Test Clause is twofold. *First*, reliance upon that Clause avoids any debate or uncertainty about the scope and application of the unconstitutional-conditions doctrine. The text of the No Religious Test Clause directly addresses and prohibits a specific condition on government employment, namely, any

condition—like the one in this case—that constitutes a "religious test."

Second, there is no need under the Clause to engage in uncertain and malleable tiered scrutiny. The test is clear and unequivocal: Religious tests for public office or positions of trust are prohibited. Period. There is no balancing, interest analysis, or anything else prone to the kind of manipulations that have grown to plague analysis of other constitutional rights. See, *e.g., June Med. Servs. LLC.* v. *Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in judgment) ("There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were."); *Crawford* v. *Washington*, 541 U.S. 36, 67-68 (2004) ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable[.]").

Accordingly, whether applied on its own or used to inform the analysis of the Free Exercise and Free Speech Clauses, the Clause can provide greater certainty and brighter lines that will benefit courts, employers, and employees alike.

To see why, one might return to the example of a Muslim whose beliefs require her to wear a hijab when in public. See *Abercrombie,* 575 U.S. at 770-771. The No Religious Test Clause would rightly forbid a public school district from imposing a requirement that all teachers reject the teachings of Mohammad. And it equally forbids the school district from imposing a "no religious head covering" condition on those that work at the school. While a uniform and religion-neutral policy against *all* headgear would raise different

questions, a condition specifically targeting religious sartorial choices by calling them government speech is a religious test no different than a pre-condition of rejecting Mohammad's teachings. The same reasoning applies equally to employment conditions that forbid crosses, yarmulkes, or any other individual expression of faith—including the brief post-game prayers at issue in this case.

CONCLUSION

Whether viewed as an unconstitutional condition under the First Amendment, or a prohibited religious test under the No Religious Test Clause, a policy that puts an employee to the choice of abandoning individual expressions of religious faith or losing public employment is invalid under our Constitution. The Ninth Circuit's contrary conclusion should be rejected, and its judgment reversed.

Respectfully submitted,

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MARCH 2, 2022